EDITOR'S NOTE

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. 84-1480-CFH
atus: GRANTED

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rch 18, 1985

Title: Louie L. Wainwright, Secretary, Florida Department of Corrections, Petitioner
v.
David Wayne Greenfield

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Paschall, Ann Garrison

Counsel for respondent: Whittemore, James D.

try	Date	Note	Proceedings and Orders
1	Mar 18 1985	G	Petition for writ of certiorari filed.
2	Apr 1 1985		Application for recall and stay filed (A-745), and order temporarily granting same by Powell, J., on 4/3/85.
3	Apr 3 1985		Response requested - Due 4/10/85.
5	Apr 18 1985		Brief of respondent David Wayne Greenfield in opposition filed.
6	Apr 18 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	Apr 24 1985		DISTRIBUTED. May 9, 1985
8	Apr 10 1985		Memorandum in opposition to above application (A-745) filed.
9	May 2 1985		Application for stay granted by Powell, J.
0	May 13 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
1	May 13 1985		Petition GRANTED.
			**********
2	May 28 1985	G	Motion of respondent for appointment of counsel filed.
3	May 31 1985		DISTRIBUTED. June 6, 1985. (Motion of respondent for appointment of counsel).
4	Jun 10 1985		Motion for appointment of counsel GRANTED and it is ordered that James D. Whittemore, Esquire, of Tampa, Florida, is appointed to serve as counsel for the respondent in this case.
5	Jun 21 1985		Joint appendix filed.
6	Jun 24 1985		Brief of petitioner Wainwright, Sec., FL DOC filed.
8	Jul 10 1985		Order extending time to file brief of respondent on the merits until August 12, 1985.
0	Aug 5 1985		Order extending time to file brief of respondent on the merits until September 6, 1985.
1	Sep 10 1985		Brief of respondent David Wayne Greenfield filed.
2	Sep 11 1985		SET FOR ARGUMENT. Wednesday, November 13, 1985. (3rd case).
3	Sep 6 1985	G	Motion of Illinois Psychological Association for leave to file a brief as amicus curiae filed.
4	Sep 6 1985	G	Motion of American Civil Liberties Union for leave to file a brief as amicus curiae filed.
5	Sep 16 1985		CIRCULATED.
6	Sep 19 1985		Record filed.
7	Sep 19 1985		Certified copy of original record 5 C.A. proceedings, 2 volumes, received.
8	Oct 7 1985		Motion of Illinois Psychological Association for leave

2pp

. 84-1480-CFH

try	Date	Note	Proceedings and Orders
			to file a brief as amicus curiae GRANTED.
9	Oct 7 1985		Motion of American Civil Liberties Union for leave to file a brief as amicus curiae GRANTED.
0	Oct 7 1985	D	Motion of Illinois Psychological Association for leave to participate in oral argument as amicus curiae and for divided argument filed.
1	Oct 15 1985		Motion of Illinois Psychological Association for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
2	Oct 30 1985	X	Reply brief of petitioners Wainwright, Sec., FL DOC filed.
3	Nov 13 1985		ARGUED.

84-1480

Case No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
State of Florida,

Petitioner,

v.

DAVID WAYNE GREENFIELD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
AND APPENDIX

BRIEF OF PETITIONER ON JURISDICTION

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COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Whether a defendant's post-Miranda warning behavior, including silence, may be used as substantive evidence of his sanity at or near the time of the offense when that defendant elects to present an insanity defense, as held by the Seventh Circuit Court of Appeals in Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1439, 75 L.Ed.2d 796 (1983) and implicitly held by the Tenth Circuit Court of Appeals in United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied, 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978) or whether such use of post-Miranda silence is violative of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) as held by the Court of Appeals in the instant case.

2. Whether the Court of Appeals decision in the instant case which reached this cause on the merits is in conflict with this Court's decision in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 249, 53 L.Ed.2d 594 (1977), where Respondent's claim was barred by his failure to comply with Florida's contemporaneous objection rule.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported as Greenfield v. Wainwright, 741 F.2d 329 (11th Cir. 1984) (rehearing denied January 28, 1985) and appears in the appendix at A 1 - 34.

The opinion of the District Court of Appeal, Second District of Florida is reported as Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976) and appears in the appendix at A 44 - A 54. The memorandum opinion of the Florida Supreme Court remanding this cause to the District Court of Appeal is reported as Greenfield v. State, 364 So.2d 885 (Fla. 1978) and appears in the appendix at A 55 - A 56.

JURISDICTION

On September 6, 1984, the United States Court of Appeals for the Eleventh Circuit reversed and remanded an Order of

the United States Court for the Middle District of Florida denying a petition for writ of habeas corpus brought by a state prisoner pursuant to 28 U.S.C. §2254. A timely petition for rehearing was summarily denied on January 28, 1985.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a capital Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

> without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV of the Constitution of the United States provides inter alia, that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Title 28 U.S.C. §2254(a) provides that:

> The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only

on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On June 26, 1975, the office of the State Attorney of the Twelfth Judicial Circuit, in and for Sarasota County, Florida filed a direct information against DAVID WAYNE GREENFIELD charging him with sexual battery committed with force likely to cause serious personal injury. Greenfield entered a plea of not guilty on July 11, 1975. This plea was changed to not guilty by reason of insanity on August 15, 1975. A Statement of Particulars in support of the insanity defense was filed October 9, 1975.

A trial by jury was held on two days, October 14, and 15, 1975. At trial, Greenfield pursued his insanity defense.

During direct examination, Officer Pilifant testified that he read Greenfield the Miranda rights (R 77); and that Greenfield refused to talk with him before consulting an attorney. (R 77 - 78) The defense registered no objection to this testimony. In closing arguments, the prosecutor made reference to the testimony of Officer Pilifant summarized in the following manner:

> "Lets go on to Officer Pilifant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow on the beach and that he went up to him, talked to him and then arrested him for the offense. The fellow voluntarily put his arms behind his back and said he would go to the car. This is supposedly an insane person under the throws of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does

> he say 'what's going on?' No. he says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down -- as going down the car as you recollect Officer Pilifant said he explained what Miranda rights meant and the guy said -- and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley - he's down there. He says, 'have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk.' 'No.' 'Do you want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant --" (R 338 - 339)

Greenfield tendered an objection to this line of argument but Greenfield did not tender a Motion to Strike or a Motion for Mistrial. Similarly, Greenfield did not

request curative instructions. (R 339)

A verdict of guilty as charged was returned and, in an order filed November 21, 1975, Greenfield was adjudicated guilty and sentenced to life imprisonment.

Notice of Appeal was timely filed on November 21, 1975. By an opinion filed September 24, 1976, the District Court of Appeal, Second District, affirmed the judgment and sentence of the trial court. A petition for rehearing was filed on October 6, 1976, and denied October 25, 1976. Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976) (A 44 - A 54) At this point, a Petition for Writ of Certiorari was filed in the Florida Supreme Court.

By an order filed March 7, 1977, the Florida Surpeme Court granted Greenfield Peitition for Writ of Certiorari and jurisdiction transferred to the Florida

Supreme Court. That Court then remanded the case to the District Court of Appeal, Second District for proceedings consistent with its decision in Clark v. State, 363 So.2d 331 (Fla. 1978). (A 55 - A 56) After such proceedings, the Second District Court of Appeal entered an order ruling that its initial opinion in Greenfield was consistent with Clark v. State, supra. and reaffirmed its original opinion. (A 57 - A 58)

Greenfield next sought federal habeas corpus relief claiming a violation of his Fifth Amendment rights by the prosecutor's reference to and use of Greenfield's post-arrest silence during trial and final argument. The federal district court denied relief (A 35 - A 43) and Greenfield appealed to the Eleventh Circuit. The Eleventh Circuit reversed, holding that

post-arrest silence could not be utilized to rebut an insanity defense.

BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction in the court of first instance was a petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW, HOLDING THAT A DEFENDANT'S POST-ARREST SILENCE CANNOT BE USED TO REBUT AN INSANITY DEFENSE, IS IN CONFLICT WITH THE DECISIONS OF THE SEVENTH AND TENTH CIRCUITS ON AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NEVER BEEN ADDRESSED BY THIS COURT.

In the case at bar, the Court of Appeals relied on this Court's opinion in Doyle v. Ohio, 426 U.S. 610,49 L.Ed.2d 91, 96 S.Ct. 2240 (1976), and held that the use of Greenfield's post-Miranda warning conduct, including his silence, as proof of sanity entitled Greenfield to a new

trial.[1] In ruling as it did, the Court of Appeals noted that both the Seventh and the Tenth Circuits have held that Doyle is inapposite in the context of an insanity defense. Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. denied, 460 U.S. 1043, 103 S .Ct. 1439, 75 L.Ed.2d 796 (1983); United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied, 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978).[2]

---

1 The Court of Appeals specifically held that the harmless error doctrine espoused in Chapman v. California, 368 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) did not apply because the prosecutor relied heavily on Greenfield's conduct as evidence of sanity. Petitioner does not challenge that ruling here.

2. At least one state supreme court has utilized the same constituional analysis contained in the Court of Appeals' Greenfield opinion. State v. Burwick, 442 So.2d 944 (Fla. 1983), cert. denied, __ U.S. __, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984)

In Sulie, the Seventh Circuit approved the use of the defendant's post-Miranda request for an attorney to establish sanity, and held:

> Against the slight inhibiiting effect on the constitutional right of silence of permitting testimony that a criminal defendant requested counsel at his interrogation, we must weigh the value to the state of being able to show that, when interrogated soon after the crime, the defendant who now claims he was insane when he committed the crime was sufficently lucid to ask for a lawyer.
>
> Id. at 130

In United States v. Trujillo, supra, the court permitted the introduction of the defendant's post-Miranda pronouncement that he did not wish to make any statement until he had consulted an attorney, as well as defendant's responses thereafter to the officer's continued interrogation. In holding that testimony admissible, the

Tenth Circuit stated:

> The agent's testimony that defendant did not want to make a statement until he consulted a lawyer was factual and not controverted. The issue in the case, properly raised by a pretrial notice, was the defense of insanity at the time of commission of the offense charged.
>
> * * * * * * * * * * * * * * * * *
>
> Post arrest silence may be pertinent to a claim of insanity. United States v. Julian, 10th Cir. 450 F.2d 575 - 579; see also United States v. Coleman, 10th Cir. 501 F.2d 342, 346. In the circumstances presented, defendant's request for a lawyer and his answers to the personal identification questions disclosed understanding and awareness proper for consideration in determining his sanity. The danger of unfair prejudice is minimal and the probative value substantial. See Rule 403, Federal Rules of Evidence. The trial court properly denied the motion for mistrial because of the agent's testimony.

Id. at 578 F.2d 288.

Similarily, in Jacks v. Duckworth, 651 F.2d 480 (7th Cir. 1981), the court of

appeals held that a trial court had properly allowed an illegally obtained tape recording to be used both "to determine the credibility of [the defendant] and his mother and on the issue of [the defendant's] sanity, but not as to whether [the defendant] had committed the crime charged." Id. at 484 (emphasis omitted). In Kaufman v. United States, 350 F.2d 408 (8th Cir. 1965), cert. denied, 383 U.S. 951 (1966) the court through Judge (now Justice) Blackmun, held that testimony concerning interviews between an FBI agent and the defendant allegedly conducted in violation of Massiah v. United States, 377 U.S. 201 (1964), was properly admitted, not "in the prosecution of the offense" but as "rebuttal to the insanity defense which by then Kaufman had projected into the case." 350 F.2d at 415. But see

United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982).

A good comparison can be made with regard to this Court's refusal to suppress illegally obtained evidence offered to impeach an accused who testified in his own defense. United States v. Havens, 446 U.S. 620, 626 (1980) and Harris v. New York, 401 U.S. 222 (1971). The principle espoused therein applies with equal force to the evidence which the State seeks to use generally to rebut an affirmative defense. Refusal to exclude such evidence leaves wholly intact the State's obligation to prove the defendant's guilt in its case-in-chief without relying on unlawfully obtained evidence or violating a defendant's right to remain silent. Once, however, a defendant affirmatively presents evidence (or a defense), there is no

rational basis upon which to deny the trier of fact probative reliable evidence on the issue of guilt, or, at bar, on the continuing viability of Greenfield's affirmative defense. There is even less justification to suppress evidence relevant to the defense of insanity. Insanity presupposes that the accused has "committed all the elements of a prescribed offense," United States v. Scott, 437 U.S. 82, 97 - 98 (1978). Consequently, courts have recognized the similarity between using illegally obtained evidence for the narrow purpose of impeachment and using it only as bearing upon the insanity defense in that it was asserted to be evidence of rationality contemporaneous to the crime. See Barkley v. United States, 323 F.2d 804, 806 (D.C. 1963). As observed in Michigan v. Tucker, 417 U.S. 433, (1974),

insanity, more than any other defense, exemplifies the need, "when balancing the interests involved, (to) weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce . . . " Id. at 417 U.S. 450.

Implicit in a careful scrutiny of Doyle and United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) is the fact that the right protected by these cases is a defendant's right to preclude the trial jury from inferring his guilt of a substantive offense based on evidence of post-Miranda silence. This Court has not raced to extend the holding of Doyle and Hale. In Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982) this Court declined to hold

that the use of post-arrest, pre-Miranda silence against a defendant was constitutionally impermissible. Nor is use of pre-arrest, pre-Miranda silence improper. Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).

The Eleventh Circuit's extension of the Doyle holding in the case at bar is not supported by the opinions of this Court. The Court of Appeals itself remarked in its opinion that this Court has never addressed the issue presented here. Greenfield v. Wainwright, supra at 333. The number of opinions in the Courts of Appeals touching on this subject clearly demonstrate that this issue is a recurring problem. That fact, together with the conflict among the courts addressing this issue plainly shows the need for this Court to speak to this issue and correct

the Eleventh Circuit's unwarranted extension of Doyle.

B. THE DECISION BELOW IGNORES THE DICTATES OF WAINWRIGHT V. SYKES, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) BY HOLDING THAT GREENFIELD'S FAILURE TO COMPLY WITH FLORIDA'S CONTEMPORANEOUS OBJECTION RULE MAY BE EXCUSED BY THE NUMBER OF HIS SUBSEQUENT UNTIMELY OBJECTIONS.

It is beyond dispute that Greenfield never contemporaneously objected to the testimony of Officers Jolley and Pilifant regarding Greenfield's post-Miranda conduct. It is only when the prosecutor argued this evidence to the jury that Greenfield's counsel saw fit to object -- once (R 339) The Court of Appeals has stated, in its opinion in this cause:

> Under these circumstances the Petitioner's failure to object to the introduction of this evidence did not preclude his right to seek appellate review of the evidence's admissiblity because he later made 20 objections to

> the prosecutor's attempt to argue the evidence to the jury. Greenfield v. Wainwright, 741 F.2d 329, 331 (11th Cir. 1984), footnote 1.

While Petitioner questions the conclusion that the mere number of subsequent objections can excuse a non-compliance with Florida's contemporaneous objection rule and thus avoid the Wainright v. Sykes bar, Petitioner must also note that a review of the record discloses one not twenty trial objections to the prosecutor's argument on this point. That ojection is contained at page 339 of the state trial transcript. The trial transcript further reflects Greenfield's failure to move for a mistrial at the time the allegedly improper argument was made.

It is clear, as a matter of Florida law that if a defendant, at the time an improper comment is made, does not move

for mistrial, he cannot, after trial, in the event he is convicted, expect a reversal on appeal. A defendant will not be allowed to await the outcome of the trial with the expectation that if he is found guilty, his conviction will be automatically reversed. Clark v. State, 363 So.2d 331 (Fla. 1978).

The failure of a litigant to raise a claim at trial or on direct appeal in accordance with the procedural requirements imposed by the state will preclude consideration of that claim by the federal district courts in a habeas corpus proceeding brought pursuant to 28 U.S.C. §2254. Wainwright v. Sykes, supra; Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982), reh. denied, 73 L.Ed.2d 1296 (1982); Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983); Hall v.

Alabama, 700 F.2d 1333 (11th Cir. 1983); Forman v. State, 633 F.2d 634 (2 DCA 1980), cert. denied, 450 U.S. 1001 (1981) and Grizzell v. Wainwright, 692 F.2d 722 (11th Cir. 1982). This is true whether the default occurred at trial and/or appeal and extends to constitutional as well as non-constitutional claims. Engle v. Isaac, supra.

Petitioner has consistently argued that the Second District Court of Appeal addressed the merits of Greenfield's claim only in the alternative, after first noting Greenfield's failure to object to the testimony of Officers Pilifant and Jolley. See Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976). On remand the district court reaffirmed its original opinion and held that it was consistent with Clark v. State, supra. Since Clark expounds the

contemporaneous objection rule under discussion it is not reasonable to assume that the Second District Court of Appeal would find its decision consistent with Clark unless it had, in fact, considered Greenfield's claim not properly preserved for appellate review.

This Court has said:

> . . . it must be remembered that direct appeal is the primary avenue for review of a conviction or sentence . . . When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attached to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Barefoot v. Estelle, __ U.S. __, 103 S.Ct. __, 77 L.ed.2d 1090, 1100 (1983).

The Eleventh Circuit's decision to

disregard the Wainwright v. Sykes bar and reach the merits of this cause flies in the face of this Court's concerns in Barefoot and requires an exercise of this Court's certiorari jurisdiction.

CONCLUSION

For these reasons, Petitioner respectfully urges this Court to grant certiorari and reverse the decision of the Court of Appeals in and for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ann Garrison Paschall, Counsel for Petitioner, and a member of the Bar of this Court, hereby certify that on the 18th day of March, 1985, I served three copies of the Petition for Writ of Certiorari on James D. Whittemore, Esq., Counsel for Respondent, 412 Madison Street, Suite 1207, Tampa, Florida 33602, by depositing with the United States Postal Service a duly addressed envelope with postage prepaid.

Ann Garrison Paschall
OF COUNSEL FOR PETITIONER

A P P E N D I X

David Wayne GREENFIELD, etc.,

Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, etc., et al.,

Respondents-Appellees.

No. 83-3111.

United States Court of Appeals,

Eleventh Circuit.

September 6, 1984.

Petitioner sought habeas corpus relief following state court conviction. The United States District Court for the Middle District of Florida, William J. Castagna, J., denied relief, and he appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that prosecutor's argument to jury that petitioner's postarrest silence showed him to be sane violated his Fifth and Fourteenth

Amendments right to a fair trial.

Reversed with instructions.

1. CRIMINAL LAW 1036.1(3)

Defendant's failure to object at trial to admission of his post*Miranda* warning silence as substantive evidence to rebut his insanity defense did not preclude his right to seek apellate review of the evidence's admissibility where he later made 20 objections to prosecutor's attempt to argue that evidence to the jury.

2. CRIMINAL LAW 407(1)

Defendant's post*Miranda* warning silence was inadmissible as substantive evidence to rebut his defense of insanity at time of offense, as it was not probative of defendant's sanity, and his assertion of insanity, through psychiatric testimony, made no reference to his conduct at

time of arrest and did not constitute perjury, so that door was not opened to prosecutor's use of his silence. U.S.C.A. Const.Amends. 5, 6

3. HABEAS CORPUS 113(12)

Court of Appeals must find a constitutional error harmless beyond reasonable doubt before it can affirm district court's denial of writ of habeas corpus.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, TJOFLAT and HENDERSON, Circuit Judges.

TJOFLAT, Circuit Judge:

David Wayne Greenfield was convicted after a jury trial in Florida state court of sexual battery committed with force likely to cause serious personal injury.

He was sentenced to life imprisonment. In this habeas corpus action, he raises one issue, whether the prosecutor's argument to the jury that Greenfield's post-arrest silence showed him to be sane violated his fifth and fourteenth amendments right to a fair trial. The district court denied relief; we reverse.

I.

On June 21, 1975, petitioner was walking on a path through the woods to Lido Beach, near Sarasota, Florida. He passed a young woman coming from the beach, who smiled and said something to him about the weather. After he passed her, he turned and choked her from behind, dragged her into the woods and forced her to engage in oral sex. Afterwards he made several inconsistent statements, among them: "I don't know why I did this. I

know why I did this." He smoked a cigarette that belonged to the woman and then found her car keys for her.

After Greenfield released her, the woman drove directly to the police station and made a report, describing petitioner's attire and saying that his legs were badly sunburned. An officer returned to the beach two hours after the assault and found petitioner walking on the beach. He told petitioner he was investigating a crime that had occurred on the beach and asked petitioner to raise his pants legs. Upon seeing that petitioner's legs were burned, he placed petitioner under arrest. Petitioner voluntarily walked to the police car and, after being advised of his Miranda rights, stated that he wanted to speak to an attorney. Otherwise he was silent. Later that day, when another

officer again advised petitioner of his rights and asked him if he wished to talk, petitioner only stated that he wanted to speak with an attorney. After speaking with a public defender, petitioner once again declined to talk with the police.

Petitioner was charged with sexual battery, Fla.Stat.Ann. §794.011(3)(1975), and pled not guilty. He later changed his plea to not guilty by reason of insanity. He went to trial on October 15, 1975. In petitioner's opening statement to the jury, his attorney indicated that he would put the prosecution to its proof of the events and, as a defense, would produce evidence of his client's insanity.

[1] In its case-in-chief, the prosecution called the victim, the investigating police officers, and the doctor who examined the victim shortly after the

assault. Two of the officers testified that petitioner had requested a lawyer after being advised of his Miranda rights, but had otherwise remained silent. The defense made no objection to this testimony.[1] At the close of the state's case petitioner moved for a judgment of acquittal. The court denied the motion.

The defense called two psychiatrists, Drs. Lose and Piotrowski, both of whom testified that petitioner had demonstrated classic symptoms of paranoid schizophrenia

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[1] Under these circumstances the petitioner's failure to object to the introduction of this evidence did not preclude his right to seek appellate review of the evidence's admissibility because he later made 20 objections to the prosecutor's attempt to argue the evidence to the jury. This can be inferred from the Florida District Court of Appeal's willingness to address the merits of the admissiblity issue during its review of the prosecutor's closing argument to the jury. See Greenfield v. State, 337 So.2d 1021, 1022-23 (Fla.Dist.Ct.App. 1976).

during their interviews with him. Each doctor stated that in his opinion petitioner was not able to distinguish right from wrong at the time of the alleged crime.[2] Dr. Lose mentioned that he had prescribed thorazine, a drug that diminishes the symptoms of schizophrenia, for petitioner while he was in prison. Schizophrenics can tolerate the drug in substantial amounts; normal individuals given such dosages become extremely drowsy. Petitioner responded positively to the treatment.

In rebuttal, the state called a psychiatrist who testified that in his

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2 In its charge to the jury at the end of the trial, the court instructed the jury to find the defendant legally insane if he was "by reason of mental infirmity unable to understand the nature of his act or its consequences or was incapable of distinguishing that which is right from that which is wrong."

opinion petitioner was not a paranoid schizophrenic and was able to distinguish right from wrong at the time he committed the offense. The psychiatrist based this opinion on his examination of petitioner, conducted while petitioner was under the influence of thorazine. He testified, however, that thorazine would have made petitioner's symptoms worse rather than better. After the rebuttal, petitioner renewed his motion for a judgment of acquittal, which was denied.

In his summation to the jury, the prosecutor presented, over petitioner's objection, the following argument:

> Let's go on to Officer Pilifant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow [petitioner] on the beach and that he went up to him, talked to him, and then arrested him for the offense. The fellow voluntarily

put his arms behind his back and said he would go to the car. This is supposedly an insane person under the throws [sic] of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Mranda [sic] rights. Does he say he doesn't understand them? Does he say "What's going on?" No. He says "I understand my rights. I do not want to speak to you. I want to speak to an attorney." Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down--as going down the car as you recollect Officer Pilifant said he explained what Miranda rights meant and the guy said--and Mr. Greenfield [the petitioner] said "I appreciate that, thanks a lot for telling me that." And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley--He's down there. He says, "have you been read your Miranda rights?" "Yes, I have." "Do you want to talk?" "No." "Do you want to talk to an attorney?" "Yes." And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant . . .

So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity.

The jury found the petitioner guilty as charged, and the judge sentenced him to life imprisonment. Petitioner moved the court for a new trial or judgment of acquittal notwithstanding the verdict, citing the prosecutor's comment on petitioner's post arrest silence. The court denied the motion.

Petitioner appealed his conviction to the Florida Second District Court of Appeal, contending in part that the trial court erred in denying his motion for a new trial based upon the prosecutor's use of petitioner's post-Miranda warning silence. The court affirmed the conviction. Greenvield v. State, 337 So.2d 1021 (Fla. Dist.Ct.App. 1976). The Florida Supreme Court granted certiorari and remanded the

case to the district court of appeal for further proceedings consistent with its decision in Clark v. State, 363 So.2d 331 (Fla. 1978).[3] The district court of appeal reaffirmed its original opinion. Petitioner then filed this petition for a writ of habeas corpus in the federal district court.

After hearing evidence regarding whether Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), barred consideration of the post-arrest silence issue, the magistrate recommended to the district court that the issue not be

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3 In Clark v. State, 363 So.2d 331 (1978), the Florida Supreme Court held that improper comments on the defendant's exercise of his right to remain silent is "constitutional error," but not "fundamental error." Accordingly, a contemporaneous objection at trial to the introduction of or comment upon such evidence is required to preserve the issue for appeal.

considered barred by Wainwright v. Sykes, since the state appellate court had reached the merits of petitioner's claim, but that it be dismissed on the merits. Petitioner timely filed objections to the recommendation. The district court adopted the magistrate's recommendations and denied the petition.[4] This appeal followed.

II.

In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the Supreme Court held that the prosecutor's use of the defendant's post-arrest, post-Miranda warning silence, not as evidence

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4 The district court made no findings of fact; rather, it determined from the record of his state trial proceedings that petitioner's claim was insufficient as a matter of law. Accordingly, we examine the record of the state trial proceedings, as did the district court, to determine whether petitioner was denied the constitutional right now in issue.

of guilt,[5] but solely to impeach the credibility of the defendant's alibi testimony violated the due process clause of the fourteenth amendment. The Court gave two reasons for its holding. First, a defendant's silence has low probative value because it is "insolubly ambiguous." 426 U.S. at 617, 96 S.Ct. at 2244. The ambiguity arises because Miranda

> require[d] that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights.

Id. Second, the Miranda warnings should

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5 Even the dissenters in Doyle agreed that the evidence was inadmissible to show guilt; in their opinion it could only be used to attack the defendant's credibility.

not be read to impose a hidden penalty on one who chooses to rely on them.

> [W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation [of the crime] subsequently offered at trial.

Id. at 618, 96 S.Ct. at 2245 (footnote omitted). These two concerns[6] provide

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6 The problem of the extent to which a person can be compelled to incriminate himself testimonially without fifth amendment protection, see Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)(fifth amendment does not protect defendant against compelled "self-incrimination" by seized blood sample), is related. Petitioner's silence here should not be analyzed as behavior showing physical evidence of sanity. Unlike the physical evidence in Schmerber (blood), silence is inextricably tied to the testimonial option which the fifth amendment protects, that is, the option

the framework within which we must judge petitioner's claim.

The Supreme Court has placed some gloss on the right articulated in Doyle. In Doyle itself the Court noted that testimony that a defendant had remained silent would be admissible to rebut the defendant's story that he had spoken with police after his arrest. In Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), the Court held that the admissibility of pre-arrest, pre-Miranda warning silence to impeach the defendant's

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not to incriminate oneself testimonially. Silence may not technically be "testimonial" or "communicative"; however, neither is it physical evidence. It occupies a unique place in that it shows a mental decision not to be testimonial or communicative. If such "conduct" is not protected, no fifth amendment protection would exist. There would be no alternative to self-incrimination. One would simply choose whether to incriminate himself by inference from silence, or by verbal means.

testimony in a state court proceeding is a state evidentiary law question; admission of the evidence would not violate the U.S. Constitution because the implicit assurance of the Miranda warning was not present In Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the Court similarly held that the admissibility of post-arrest, but pre-Miranda warning statements to impeach the defendant's testimony did not violate the fourteenth amendment but was rather a state evidentiary decision. The Court has not discussed the issue we now face: the admissibility of a defendant's post-Miranda warning silence when offered not to impeach, but, rather, as substantive evidence to rebut his defense of insanity at the time the offense. In evaluating this claim, we first examine the extent to

which the two factors relied upon by the Doyle court are present in this case.

A.

[2] We first examine the probative value of the evidence. The State argues here that petitioner's silence and request for a lawyer was highly probative of his sanity. We are not convinced.

Insanity is a broad term convering a variety of mental and emotional diseases or defects that prevent the criminal from formulating the requisite punishable intent when he commits a criminal act. The level of lucidity under which an insane person operates may vary with time. Symptoms of insanity also vary widely, with the specific disease and with time, ranging from complete withdrawal (which is often marked by silence) to violent rages. A person's apparent level of comprehension

may not always correspond to his level of sanity at the time. Accordingly, the probative value of a person's post-arrest, post-Miranda warning silence in determining his sanity at the time of the crime will vary markedly with the disease he has, the symptoms he tends to exhibit, and the closeness in time between the arrest and warning and the crime.

Here two psychiatrists considered petitioner to be a paranoid schizophrenic. At trial, psychiatric testimony suggested that such a person is often quiet. Paranoid schizophrenics, the doctors noted, are often capable of spawning complex, rational plans of action, although they operate under delusions. For example, the State's psychiatrist noted that a paranoid schizophrenic might dream up an elaborate, coherent plan to murder his neighbor,

based on the delusion that the neighbor was a KGB agent trying to assassinate him. For petitioner to have consistently asked for a lawyer and refused to speak with police, then, might only reflect his paranoia that the authorities were persecuting him even though he was innocent.

As the Supreme Court of Florida noted in finding post-arrest, post-Miranda warning silence not probative of insanity:

> [T]hese ambiguities attendant to post-Miranda silence do not suddenly disappear when an arrestee's mental condition is brought into issue . . [o]ne could reasonably conclude that custodial interrogation might intimidate a mentally unstable person into silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on . . . a Miranda warning.

State v. Burwick, 442 So.2d 944, 948 (Fla. 1983), cert. denied, __ U.S. __, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). In this case, the evidence was probative only

of petitioner's ability to understand English[7] and to remain calm, which would be consistent with the mental disease of paranoid schizophrenia. The evidence accordingly was not probative of petitioner's sanity.

B.

We next turn to the concern expressed by the Supreme Court in Doyle that the defendant not be penalized for exercising his right to silence in view of the implicit assurance the Miranda rights give that, if the arrestee chooses not to speak, his silence will not be used against him. This concern was reiterated

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[7] Had petitioner's particular disorder been that he considered himself to be the literary Don Juan and understood only Spanish when he was in a delusional period, the probative value of his response to the officer's English warnings would have been much higher.

in Fletcher, 455 U.S. at 607, 102 S.Ct. at 1312, where the Court stated that "the sort of affirmative assurance embodied in the Miranda warnings" gives rise to a due process violation when post-warning silence is used by the prosecutor.

We first note that nothing in the Miranda "assurances" given to petitioner limited them to the instance where guilt, rather than insanity, would be the trial issue. In this respect petitioner's situation was identical to that of Doyle. Petitioner's silence was used against him at trial after he asserted his right to silence. He received no prior indication that he could be so penalized for maintaining silence; indeed, in the Miranda warnings he was implicitly assured that he would not be so penalized.

Further, petitioner's silence was not

admissible under the well-established exception noted in Doyle, that otherwise inadmissible evidence may come in where the defendant takes the stand and perjures himself regarding such evidence, 426 U.S. at 619, n. 11, 96 S.Ct. at 2245, n. 11; for petitioner never testified that he did not remain silent. Petitioner's assertion of insanity, through psychiatric testimony, made no reference to his conduct at the time of the arrest, did not constitute perjury, and therefore did not open the door to the prosecutor's use of post-Miranda silence as permitted by Doyle.

C.

Having examined both factors emphasized by the Doyle Court in the context of the facts before us, we discuss how they should be synthesized. The Seventh and Tenth Circuits, in analyzing similar

situations, have decided that the Doyle decision is inapposite in the context of an insanity defense. The Seventh Circuit has so held explicitly, Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. denied, __ U.S. __, 103 S.Ct. 1439, 75 L.Ed.2d 796 (1983); the Tenth Circuit, in United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied, 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978), has implicitly agreed.[8]

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[8] It is interesting to note that the two cases Trujillo relied on for its conclusion that post-Miranda silence or requests for a lawyer are admissible to show sanity do not directly support that conclusion. One, United States v. Julian, 450 F.2d 575 (10th Cir. 1971), specifically states that admission of post-arrest silence to show mental competence would have "a completely false premise in fact or law." Id. at 579. The court permitted evidence of the defendant's conduct at the time of his arrest only when the defense psychiatrist testified that the defendant "was trying to be arrested," because the

In Trujillo, a government agent testified that he read Trujillo his Miranda rights, Trujillo requested a lawyer, the agent continued to question Trujillo, and Trujillo told the agent his name, social security number, education, and parents' addresses. The government apparently never argued at trial that Trujillo's responses should be considered evidence of his sanity. The court of appeals determined, however, that the evidence was properly admitted because it was pertinent to the insanity claim, noting that in these circumstances, including that "the government did not exploit post-arrest silence,"

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defendant's conduct tended strongly to show that he was not trying to be arrested. In the second case, United States v. Coleman, 501 F.2d 342 (10th Cir. 1974), the defendant never challenged the admission of his post-arrest silence and request for a lawyer. Both of these cases were decided prior to Doyle.

the danger of unfair prejudice [was] minimal and the probative value substantial." Id. at 288.

The Sulie court employed a more lengthy analysis. There, the prosecutor called an officer to testify that the petitioner, after receiving the Miranda caution, requested a lawyer. The evidence was used to show that the petitioner was sane at the time he committed the crime. The court of appeals used a two-prong test in approving the evidence. First, it decided without examining the particular circumstances of that defendant's illness that the probative value, to show petitioner's sanity, of the evidence that petitioner requested a lawyer was "great." 689 F.2d at 131. Second, it examined "how much the exercise of the right to remain silent would be deterred if a suspect knew

that a request for a lawyer could be used as evidence of his sanity." Id. at 130. The court concluded that, since few defendants raise an insanity defense and fewer still are planning their defenses when they are arrested, the suspect's knowledge that his request for a lawyer could be used against him to show his sanity would have only a slight inhibiting effect on the exercise of the right to counsel. Noting that the prosecution needed all the evidence of sanity it could get, the court found the testimony to have been properly admitted.

We disagree with the conclusion of both appellate courts that evidence of a post-Miranda warning silence or counsel request is generally highly probative of sanity at the time of the offense. We also disagree with the appropriateness,

after Doyle, of the Sulie court's second inquiry.

The Sulie court analyzed the probative value of the request as follows: "Where evidence that the defendant asked for a lawyer is used to prove . . . guilt, its probative value is slight (it is not true that only a guilty person would want to have a lawyer present when he was being questioned by the police); but here it was great." 689 F.2d at 131. The flaw in this logic--as the record in this case shows--is that it is not necessarily true that only a sane person wants a lawyer present when he is being questioned by the police. An excessively paranoid individual, in particular, may want any protection from the police that he can get. As we have previously stated, probative value of the conduct to show sanity in part

depends on the nature of the alleged insanity, and, in most circumstances, we cannot conceive that the probative value as to sanity would be significantly greater than the probative value as to guilt or as to credibility in asserting an alibi defense.

The second point analyzed in Sulie, what impact use of post-Miranda conduct to show sanity may have on criminal suspects in general, sidesteps the point made in Doyle. The particular suspect, having been implicitly assured that his silence will not be used against him at all and quite likely relying on that assurance, is penalized at trial for exercising his right to remain silent when his silence is used against him as evidence of his sanity. It might well be that, if suspects were told that their post-Miranda warning

silences could be used to show their sanity, most suspects would pursue the same course of action. However, until and unless we correctly set out for the particular suspect how his right is limited, we penalize him for exercising his right to silence by an after-the-fact assertion of a limitation on the right. We agree with Judge Cudahy's dissent in Sulie that the appropriate inquiry in this type case is not whether defendants generally will be inhibited from exercising their fifth amendment rights, but rather whether the particular defendant has been penalized for exercising such rights and whether he has been harmed by the penalty. This is consistent with the position taken by the Supreme Court in Doyle, where the Court focused on whether Doyle himself had been harmed, not on the broad inhibitory

effects on the right to remain silent. Similarly, in Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Court held that a prosecutor could not comment on a defendant's failure to testify at trial because it imposed a penalty on his exercise of his fifth amendment privilege not to incriminate himself. 380 U.S. at 619, 85 S.Ct. at 1232. The Court did not look at the inhibitory effect of prosecutorial comment on defendants exercising the right generally. The Third Circuit described the proper inquiry to be "whether the particular defendant has been harmed by the state's use of the fact that he engaged in constitutionally protected conduct, not whether, for the particular defendant or for persons generally, the state's reference to such activity has or will burden

the exercise of the constitutional right." United States ex rel. Macon v. Yeager, 476 F.2d 613, 616 (3rd Cir.), cert. denied, 414 U.S. 855, 94 S.Ct. 154, 38 L.Ed.2d 104 (1973) (emphasis in original).

In this case, we feel that adherence to the Doyle analysis is appropriate and that it requires us to send petitioner back to the state courts for retrial. Petitioner exercised his rights to remain silent and to request counsel. He did so in circumstances having no more probative value as to sanity than the circumstances in Doyle had as to guilt; in both situations the silence was "insolubly ambiguous." Petitioner exercised his rights to silence and to counsel after receiving the same implicit assurance Doyle received that his silence would not be used against

him.

Moreover, as we have pointed out, unlike in Doyle, petitioner did not take the stand. Any use of his silence was as substantive evidence against him, a use that even the Doyle dissenters would have decried. This case can not fall under the exception of a defendant using the fifth amendment as a shield for perjury because the defendant never took the stand. His experts likewise did not place his conduct at the time of his arrest directly in issue in the opinions they expressed.[9]

[3] We now turn to the question of whether the prosecutor's argument

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[9] We do not determine, here, if or when such silence might appropriately be used to impeach on cross-examination a defense psychiatrist who raised the defendant's behavior with police at the time of or after his arrest and Miranda warning as evidence of insanity. We note only that this issue is not presented in this case.

constituted harmless error. We must find a constitutional error harmless beyond a reasonable doubt before we can affirm the district court's denial of the writ. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The prosecutor relied strongly on the petitioner's conduct as evidence of sanity; his closing argument was not lengthy and the portion challenged here was not minor. We cannot say that the error was harmless beyond a reasonable doubt.

The judgment of the district court is reversed. On remand, the district court shall issue the writ, calling for the state to retry the petitioner within a reasonable time (to be determined by the district court) or to discharge him.

REVERSED, with instructions.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DAVID WAYNE GREENFIELD,
#051271,

Petitioner,

vs CASE NO. 80-290-CIV.T.WC.

LOUIE L. WAINWRIGHT,
Secretary, Department
of Corrections, State
of Florida,

Respondent.

REPORT AND RECOMMENDATION

THIS CAUSE came on for consideration of a petition for writ of habeas corpus filed by as State prisoner, DAVID WAYNE GREENFIELD, pro se, in forma pauperis, pursuant to 28 U.S.C. §2254.[1]

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[1] This matter comes before the undersigned pursuant to the Standing Order of this Court dated April 6, 1979. See also Local Rule 6.01(c)(17).

On June 26, 1975 in Case No. 75-425-CF-A-01 in the Circuit Court in and for Sarasota County, Florida, Petitioner was charged by information with sexual battery committed with force likely to cause serious personal injuyr, contrary to §794.02 (2), Fla. Stat. (1975). On October 15, 1975, Petitioner was convicted after jury trial. He was adjudicated guilty and on November 21, 1975 was sentenced to life imprisonment.

Petitioner originally entered a plea of not guilty. Subsequently, his attorney entered a change of plea to not guilty by reason of insanity.

On October 16, 1975, Petitioner filed a motion for new trial or in the alternative for a judgment notwithstanding the verdict. He argued that the court had erred in allowing the prosecutor to

comment on the defendant's refusal to give a statement to police officers after the defendant was advised of his Miranda warnings and right to remamin silent. The trial court, after hearing argument, denied the motion.

On direct appeal, Petitioner contended that the trial court erred in refusing to grant a motion for new trial on the ground that the prosecutor had commented on his exercise of his right to remain silent during closing argument. The Second District Court of Appeal affirmed Petitioner's conviction with a written opinion. See, Greenfield v. State, 337 So.2d 1021 (2d DCA 1976); rehearing denied October 25, 1976. The Florida Surpeme Court, upon a petition for writ of certiorari, granted certiorari and remanded the case back to the Second District Court of

Appeal for further proceedings consistent with its decision in Clark v. State, 363 So.2d 331 (Fla. 1978). See Greenfield v. State, 364 So.2d 885 (Fla. 1978). Thereafter the Second District Court of Appeal affirmed its original opinion. See, Greenfield v. State, unreported Order entered October 1, 1979, copy in file.

This petition for writ of habeas corpus followed. Counsel was appointed to represent the indigent Petitioner and a Pre-Trial Stipulation was entered. Respondent does not contend that Petitioner has failed to exhaust available State remedies.

The sole issues raised by the parties are:

a. Whether Petitioner was denied due process of law by the prosecutor's use of and reference to defendant's post-

silence during 1) trial and 2) final argument; and

b. Whether the holding in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), bars review of Petitiner's claim.

The facts in this case, simply stated, are that Petitioner, identified and arrested shortly following a sexual assault, upon receiving Miranda warnings, requested an attorney and made no statement. The prosecutor elicited testimony of the officer disclosing Petitioner's request for counsel in an attempt to overcome Petitioner's defense of insanity. Petitioner claims violation of his rights under Doyle v. Ohio, 426 U.S. 610 (1976). Respondent claims an exception to the Doyle rule under Harris v. New York, 401 U.S. 222 (1971).

Only one fedeal appellate court panel has met this issue squarely. In Sulie v. Duckworth, __ F.2d. __ (7th Cir. 1982), 32 Cr.L. 4046, under material facts the same as in the instant case, the court held the state may show that a defendant who raises the insanity defense was sufficiently lucid to ask for a lawyer, outweighing the slight effect this testimony will have on the constitutional right of silence. (A copy of the Sulie opinion is attached hereto as Appendix 1). Based on the Sulie decision, and the reasoning of the majority expressed therein, I recommend that the petition be DENIED.[2]

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2 Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. 636(b)(1). Local Rule 6.02; Nettles v. Wainwright, 677 F.2d 404, (5th Cir. 1982)(en banc).

Respondent also seeks dismissal of Petitioner's claim for failure to object at time of trial. The record is clear that the Petitioner did object to the prosecutor's closing argument reference to Petitioner's request for counsel and failure to make any other statement. The record is further clear that the Florida Second District Court of Appeals reached the merits of Petitioner's claim both in the original opinion and upon remand. Accordingly, the Petitioner is not barred from raising the issue in this Court.

This 29th day of October, 1982.

[s]
PAUL GAME, JR.
UNITED STATES MAGISTRATE

(Appendix one to Magistrate Game's opinion is omitted by Petitioner.)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DAVID WAYNE GREENFIELD,

Petitioner,

vs. CASE NO. 80-290-CIV-T-WC

LOUIE L. WAINWRIGHT,

Respondent.

ORDER

This cause came on for consideration of a petition for writ of habeas corpus filed by a State prisoner, David Wayne Greenfield, pro se, in forma pauperis, pursuant to 28 U.S.C. §2254.

The matter was considered by the United States Magistrate, pursuant to general order of assignment, who has filed his report recommending that the petition be denied.

Upon consdieration of the report and

recommendation of the Magistrate and upon this Court's independent examination of the file, the Magistrate's report and recommendation is adopted and confirmed and made a part hereof. Therefore, it is

ORDERED:

1. The petition for writ of habeas corpus is denied.

DONE AND ORDERED at Tampa, Florida this 25th day of January, 1983.

[s]
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
PETITION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT
JULY TERM, A.D. 1976

DAVID WAYNE GREENFIELD,

Appellant,

v. CASE NO. 75-1731

STATE OF FLORIDA,

Appellee.

Opinion filed September 24, 1976

Appeal from the Circuit
Court for Sarasota County;
Roy E. Dean, Judge.

Jack O. Johnson, Public Defender,
Robert H. Grizzard, II, Assistant
Public Defender, and Paul J. Martin,
Legal Intern, Bartow, for Appellant.

Robert L. Shevin, Attorney General,
Tallahassee, and William I. Munsey,
Jr., Assistant Attorney General,
Tampa, for Appellee.

McNULTY, Chief Judge.

On this direct appeal appellant

Greenfield assails his conviction of sexual battery. The sole issue on appeal relates to the denial of a motion for new trial predicated on the ground that the prosecutor prejudicially commmented in summation on appellant's exercise of his right to remain silent at the giving of his Miranda rights at the time of his arrest. We affirm.

Most significantly, in this case, appellant pleaded not guilty by reason of insanity. Accordingly, there was no real dispute as to the essential objective facts herein. They are that the prosecutrix, having sunned hereself on a local beach in Sarasota in the late morning or early afternoon on the day of the offense, was returning to her car because of the threat of rain. It was necessary that she pass through a wooded area bordering the

beach. While in this wooded area she was accosted by appellant and dragged to a more secluded area of the beach where the sexual assault occurred. Upon her release by appellant the prosecutrix drove immediately to the police station and reported the incident, describing appellant. A police officer promptly returned to the scene of the assault and in the vicinity thereof spotted appellant as one fitting in considerable detail the description given by the prosecutrix. He arrested appellant and read him his Miranda rights.

The officer testified that he explained these rights, that appellant thanked him for explaining the, and that appellant said he understood them and did not wish to speak to the officer until he spoke to an attorney. Shortly thereafter at the police station appellant was again

interviewed by other officers, again reminded of his rights and again he reiterated that he did not wish to speak to the officers, that he wanted to speak to an attorney. In fact, he was permitted to and did call an attorney. No objection was made to the introduction of this evidence relating to the giving of the Miranda rights and to appellant's responses thereto.

During closing arguments, however, the prosecutor made the following comments:

> "But let's go on from what she stated. Let's go on to Officer Pilafant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow on the beach and that he went up to him, talked to him and then arrested him for the offense. The fellow voluntarily put his arms behind his back and said he would go to the car.

This is supposedly an insane person under the throes of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say 'What's going on?' No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down--as going down [in] the car as you recollect Officer Pilafant said he explained what Miranda rights meant and the guy said--and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley--he's down there. He says, 'Have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk?' 'No.' 'Do yo want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant."

At this point, counsel for defendant

strenuously objected on the basis that such comments were improper references to appellant's insistence on his Fifth Amendment right to silence. We cannot agree.

While we do agree that, at least in the face of an objection, testimony or prosecutorial comment relating to a defendants insistence on his right to remain silent generally constitutes reversible error,[1] we are of the view that under the circumstances of this case the general rule ought not apply.

When insanity is raised by plea as a defense, and evidence thereof is forthcoming prima facie sufficient to raise a

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[1] Shannon v. State (Fla. 1976), __ So.2d __ (Case No. 47-611, Opinion filed June 30, 1976); Bennett v. State (Fla. 1975), 316 So.2d 41; Clark v. State (Fla. App. 2d, 1976) __ So.2d. __ (Case No. 74-889, Opinion filed July 28, 1976).

reasonable doubt, the state no longer can travel on the presumption of sanity; it must establish sanity beyond a reasonable doubt as with every element of the offense charged.[2] Certainly, evidence of the conduct and apparent state of mind and awareness of an accused, particularly where, as here, it is connected closely in point of time to the crime charged, is relevant to this issue; and it would be manifestly unfair to permit a defendant prima facie to establish a defense and then preclude the state from meeting it by barring relevant evidence to the contrary because of the "Miranda" rationale.[3]

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2 See, e.g., Farrell v. State (Fla. 1958), 101 So. 2d 130; Byrd v. State (Fla. App. 2d, 1965), 178 So.2d 886.

3 Cf. Harris v. New York (1971), 401 U.S. 222, 91 S.Ct. 643.

Here, for example, the evidence relied upon by the state was perhaps the most competent evidence on appellant's mental capacity at the time of the offense available, being so closely connected to the res gestae. It was neither unfair to introduce it[4] nor improper to comment upon it in summation; and, though considered in a somewhat different context (i.e., with respect to a defendant's right to silence during a psychiatric evaluation ordered by the court), we concur with the

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4 No issue is made herein about the postural sequence in which the evidence came in. That is, the evidence came in during the state's case in chief before there was any evidence from the appellant as to his insanity. But no objection was made at the time. So, by objecting to prosecutorial comments thereon during summation, the appelalnt is in no different position than he would have been in had such evidence been introduced in rebuttal, when it would have been, as we hold here, proper.

observations of Mr. Justice Adkins in Parkin v. State:[5]

> "When the plea of not guilty by reason of insanity was entered, it was done so with knowledge of the existing statutes and case law on the subject. There is no constitutional right to plead this defense, and, if the statutes and case law permit a defendant the privilege of raising it, he must waive certain constitutional rights with respect to it, including the privilege against self-incrimination. . .

In view whereof, the judgment and sentence appealed from should be, and they are hereby, affirmed.

HOBSON, J., CONCURS.

GRIMES, J., DISSENTS WITH OPINION.

GRIMES, J.,dissenting.

There is considerable logic in Judge McNulty's opinion. Yet, it is an appreciable step beyond Harris v. New York in

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5 (Fla. 1970), 238 So.2d 817.

which the U.S. Supreme Court held that when a defendant took the stand he could be cross-examined on inconsistent statements he had given to the police in violation of his Miranda rights. That decision was based upon the premise that a person should not be entitled to commit perjury and at the same time hide behind the constitutional right to remain silent.

Here, there is no question of perjury because the appellant did not take the stand, and I canot equate interposing a defense of insanity with the giving of perjured testimony. The testimony of Officer Pilafant, had it been objected to, and the comments of the prosecutor in closing argument, which were objected to, would require reversal under Bennett v. State, supra. The fact that this evidence was probative on the sanity issue cannot

deprive appellant of his constitutional protections.

Moreover, had the state been conscious of the possibility that Pilafant's testimony might result in a violation of Miranda principles, the problem could have been avoided with a minimum of prejudice to the state's case. The questions and answers could have been couched in such a manner as to permit the officer to convey to the jury the fact that the appellant carried on a perfectly rational conversation without specifically stating that he chose to avail himself of his right to remain silent.

In view of the present posture of the law on this subject, I must respectfully dissent.

IN THE SUPREME COURT OF FLORIDA
TUESDAY, SEPTEMBER 12, 1978

DAVID WAYNE GREENFIELD,

Petitioner,

v. CASE NO. 50,565

STATE OF FLORIDA, DISTRICT COURT OF APPEAL, SECOND DISTRICT 75-1731

Respondent

ORDER

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal in Greenfield vs. State, 337 So.2d 1021 (Fla. 2 DCA 1976). Certiorari is granted and this case is remanded for further proceedings consistent with our recent decision in Clark v. State, Case No. 50,336 (opinion filed July 28, 1978).

ENGLAND, C.J., OVERTON, SUNDERBERG, HATCHETT and ALDERMAN, JJ., Concur
ADKINS and BOYD, JJ., Dissent

A True Copy cc: Hon. William A. Haddad,
Clerk
TEST: Hon. R.H. Hackney, Jr.,
by: [s] Clerk
Chief Deputy Hon. Roy E. Dean, Chief
Clerk Judge

Sid J. White Hon. Jack O. Johnson
Clerk William I. Munsey, Jr.
Supreme Court Esquire
Mr. David Wayne Greenfield

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

OCTOBER 1, 1979

DAVID WAYNE GREENFIELD,

Appellant,

v. CASE NO. 75-1731

STATE OF FLORIDA,

Appellee.

Pursuant to the order of the Florida Supreme Court remanding this case for further proceedings consistent with Clark v. State, 363 So.2d 331 (Fla. 1978), and it appearing that this court's decision in the above-styled case is consistent with Clark v. State, supra, upon consideration, it is

ORDERED that this court's prior affirmance herein is hereby adhered to.

A TRUE COPY
TEST:

[s] William A. Haddad

CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: Jack O. Johnson
Attorney General
Hon. R.H. Hackney, Jr.
David Greenfield
Hon. Sid J. White

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1480

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
State of Florida,

Petitioner,

v.

DAVID WAYNE GREENFIELD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1480

LOUIE L . WAINWRIGHT, Secretary
Department of Corrections,
State of Florida,

Petitioner,

v.

DAVID WAYNE GREENFIELD,

Respondent.

_____/

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, David Wayne Greenfield, In Forma Pauperis, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 741 F.2d 329.

QUESTIONS PRESENTED

1. Whether a defendant is denied due process of law by the prosecutor's reference to and use of his post-arrest, post-Miranda silence and invocation of his right to counsel during trial and final argument, when that defendant presents an insanity defense.

2. Whether the Court of Appeals decision in the instant case which reached this cause on the merits is in conflict with this Court's decision in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 249, 53 L.Ed.2d 594(1977), when Petition did not appeal the District Court's ruling on this issue but raised it only belatedly in a Petition for Rehearing filed with the Eleventh Circuit Court of Appeals.

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STATEMENT OF THE CASE

Respondent accepts the statement of the case contained in the Petition for Writ of Certiorari, except as supplemented herein.

In his opening statement, Respondent's trial attorney confirmed to the jury that the defense was not guilty by reason of insanity but did not admit or concede that Respondent had committed the offense and in fact reminded the jury of the state's burden of proof, explaining that the defense was, "if it can be proven that he did commit it," that the defendant was insane (TR-16, 17).

During the state's case in chief, the prosecutor asked officer Pilafant, the arresting officer, whether the defendant had said anything to him after his arrest, to which Pilafant responded, "No, sir" (TR-76). The prosecutor then elicited that Pilafant had advised Respondent of his Miranda[1] rights, after which the following colloquy occurred:

> Question: When you asked him "Did you understand these rights, what did he state?
> Answer: He stated yes, he did.
> Question: And when you asked him the question if he wanted to talk to you at this time what did he say?
> Answer: No, he did not, He wished to talk to an attorney first.
> Question: Is that the exact words he used?
> Answer: Lawyer, sir. (TR-77; 78)
>
> * * *
>
> Question: All right. Did he talk to you at any time at booking.
> Answer: o, sir. We asked him at that time if - I - I'm not sure exactly who asked him the question. But he - I know he stated to me personally that he did not wish to make any statements at the time, wanted to talk to a lawyer. (TR-7$).
>
> * * *
>
> Question: To your knowledge did he in fact speak to an attorney that day?
> Answer: Yes, sir. He spoke with an attorney name of Larry Staub. 747-7591.
> Question: After he spoke with that attorney, did he make any statement?
> Answer: No, sir. He did not. Not to my knowledge. Not to myself, at least.

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1601, 16 L.Ed.2d 694 (1966).

Upon arrival at the police station, Detective Gordon R. Jolley interviewed Respondent, after ascertaining that he had been advised of his constitutional rights (TR-95). Detective Jolley testified:

> "... I asked him if he wished to give up the right to remain silent and talk to me about this case. He replied, "No, I want to talk to an attorney". At that time no further questions were asked. (TR-96)
>
> * * *
>
> "We proceeded with the booking of the defendant at this time we asked him if he desired attorney. We informed him that if he desired one or could not afford one, one would be appointed for him free of charge at that time, and asked him if he desired to speak with an attorney at that time. He replied yes. We telephoned the number for the Public Defender's Office and a man answered, identified himself as an attorney, Larry Staub, and the phone was handed to the defendant" (TR-97).

The colloquy continued:

> Question: "All right. After the conversation between the defendant and his attorney what occurred?"
> Answer: I then asked the defendant if after having spoken to his attorney if he desired again to give up the right to remain silent, and at that time, talk to me about the case. He again replied no. (TR-97; 98).

During his summation, the prosecutor on two occasions made reference to Greenfield's invocation of his constitutional rights, urging significance from Greenfield's conscious decision to exercise his rights given that this was "supposedly an insane person under the throws of an acute condition of schizophrenic paranoia at the time." (TR-338). He argued:

> "... he says, "I understand my rights. I do not want to speak. I want to speak to an attorney ..." (TR-338).
>
> "... and then even down at the station, according to Detective Jolley - he's down there. He says, "have you been read your Miranda rights? "Yes, I have." "Do you want to talk"? "No." "Do you want to talk to an attorney"? "Yes." " And after he talked to the attorney again he will not speak." (TR-339).

At this point, defense counsel objected to this comment on Respondent's silence and after an off the record bench conference,

the trial court overruled the objection (TR-339). In the Federal habeas corpus proceedings, the United States Magistrate held an evidentiary hearing on the sole issue of whether there had been a waiver of objection by Respondent, under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). (See: Vol. II, record on appeal). The Magistrate, in his Report and Recommendation, determined that Respondent had preserved the issue by proper objection and that, in any event, the state appellate court had reached the merits of the claim (R-176). The Petitioner did not file written objections to this finding and did not otherwise oppose the District Court's order, which adopted the Magistrate's Report and Recommendation (R-185).

Before the Eleventh Circuit, the Petitioner Wainwright did not raise by cross-appeal or otherwise the issue of waiver under Wainwright v. Sykes. Neither party briefed the Wainwright v. Sykes issue and the Eleventh Circuit mentioned it only parenthetically in footnote no. 1 of its opinion. Only after the Eleventh Circuit had reversed the District Court did Petitioner, in his Petition for Rehearing, address himself to the Wainwright v. Sykes waiver issue.

REASONS WHY THE WRIT SHOULD BE DENIED

This Court's Prior Decisions are Controlling:

The instant case falls clearly within the proscription against the use of post-Miranda silence announced by this Court in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Doyle is therefore controlling and certiorari need not and should not be granted.

In Doyle, this court held that a prosecutor's use of a defendant's post-arrest, post-Miranda warning silence, to impeach the Defendant's alibi defense, violated the due process clause of the Fourteenth Amendment. This Court gave two reasons for proscribing the use of a defendant's post-arrest, post-Miranda silence. First, such silence was deemed to be "insolubly ambiguous" and therefore had low probative value. 426 U.S. at 617, 96 S.Ct. at 2244. The ambiguity was said to exist because the Miranda warnings advise a defendant that he has the right to remain silent, that anything he says may be used against him and that he has the right to consult with counsel before submitting to interrogation. Silence, as this Court observed, in the wake of these warnings, may be nothing more than the arrestee's exercise of his Miranda rights. Secondly, this Court noted that while Miranda warnings do not contain an express assurance that silence will carry no penalty, there is an implicit assurance in the warnings that one's silence and the exercise of his rights will not carry any penalty. In light of this implicit assurance, this Court determined it would be "fundamentally unfair and a deprivation of due process" to allow the arrested person's silence to be used to impeach an explanation "of the crime" subsequently offered at trial. Id. at 618, 96 S.Ct. at 2245. As the Eleventh Circuit reasoned, whether the evidence of silence is introduced on the issue of substantive guilt or innocence or on the issue of insanity, the implicit assurances in the Miranda warnings are the same, to wit: that a defendant will not be penalized for maintaining silence. Greenfield v. Wainwright, supra.

Petitioner can advance no sound reasons why this Court should depart from or overrule Doyle v. Ohio. Silence today is still "insolubly ambiguous", regardless of the defense which a defendant presents during the course of his trial. As observed by the Supreme Court of Florida:

> "In sum, just what induces post-arrest, post-Miranda silence remains as much a mystery today as it did at the time of the Hale decision. Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt". State of Florida v. Burwick, 442 So.2d 944, 948 (Fla. 1983), cert. denied ____ U.S. ____, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984) in which the Florida Supreme Court specifically disapproved of the decision of the Florida Second District Court of Appeal in Greenfield v. State, 337 So.2d 1021 (Fla. 2nd D.C.A. 1976).

The opinion of the Eleventh Circuit reflects a considered evaluation of the trial testimony of the two psychiatrists who considered Greenfield to be a paranoid schizophrenic. Observing that the psychiatric testimony suggested that such a person is often quiet, the Court appropriately determined that the probative value of one's post-arrest, post-Miranda warning silence in determining his sanity "will vary markedly with the disease he has, the symptons he tends to exhibit and the closeness in time between the arrest and warning and the crime." Observing that silence, under these circumstances, might only reflect one's paranoia that the authorities were persecuting him even though he was innocent, and that the silence would be consistent with the mental disease of paranoid schizophrenia, the Court appropriately determined that such evidence was not probative of Greenfield's sanity.

Further, the Eleventh Circuit found nothing in the Miranda "assurances" given to Greenfield which limited them to the instance where guilt, rather than insanity, would be the trial issue. Observing that Greenfield exercised his rights to silence and to counsel after receiving the same implicit assurance Doyle received, the Court correctly concluded that Doyle v. Ohio prohibited the use of comment upon the exercise of those rights, noting:

> If such "conduct" is not protected, no Fifth Amendment protection would exist. There would be no alternative to self-incrimination. One would simply choose whether to incriminate himself by inference from silence, or by verbal means. 741 F.2d 329, footnote no. 6.

In this case, just as in Doyle v. Ohio, the state pleads necessity as justification for the prosecutor's use of a defendant's post-arrest, post-Miranda silence. Yet, as observed by the Florida Supreme Court in Burwick, post-arrest, post-Miranda silence remains as much as mystery today as it did at the time of the Hale decision. Necessity simply cannot justify the use of one's silence and the exercise of one's constitutional rights, given the assurances contained in the Miranda warnings. These assurances are significant to all criminal defendants, regardless of the nature of the defense raised, absent perjury or legitimate impeachment when a defendant testifies. See: e.g. Harris v. New York, 401 U.S. 222 (1971); Jenkins v. Anderson, 447 U.S. 231 (1980); Fletcher v. Weir, 455 U.S. 603 (1982). Unlike these cases, however, Greenfield did not testify during his trial, and therefore could not have committed perjury. Furthermore, Greenfield's silence occurred after he had been arrested and advised of his Miranda rights. These cases reflect that this Court has never shown a tendency to allow use of post-Miranda silence against a non-testifying defendant under any circumstances.

The Eleventh Circuit Court of Appeals correctly analyzed the case under the teachings of Doyle and correctly determined that Doyle proscribes the use of Greenfield's post-arrest, post-Miranda silence under these circumstances. In this case, the use of Greenfield's silence and his invocation of his right to counsel was clearly an attempt by the prosecutor to draw meaning, to wit: guilt, from that silence and Sixth Amendment assertion. As such, it was constitutionally impermissible and in derogation of Petitioner's Fourteenth Amendment right to due process.

The Decision Below Follows an Unbroken Line of Authority:

Not only does the Eleventh Circuit opinion below follow the controlling authority of Doyle v. Ohio, supra, but it also follows

an unbroken line of authority reflected in various opinions and decisions of this Court decided since Doyle v. Ohio.

For example, in South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916 (1983), Justice O'Connor, writing for the majority, reiterated the Doyle logic:

> "... the Miranda warnings emphasize the dangers of choosing to speak ("whatever you say can and will be used as evidence against you in court"), but give no warning of adverse consequences from choosing to remain silent. This imbalance in the delivery of Miranda warnings, we recognized in Doyle, implicitly assures the suspect that his silence will not be used against him" 103 S.Ct. at 924.

In Anderson v. Charles, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980), this Court approved the cross-examination of a testifying defendant whose trial explanation included facts which were not included in his explanation given to the arresting officer in the post-Miranda interrogation. This Court distinguished that case from Doyle, concluding that the instant cross-examination did not refer to the defendant's exercise of his right to remain silent but rather referred to his inconsistent explanations during trial. The Court noted that:

> Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But Doyle does not apply to cross-examination which merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all. 100 S.Ct. at 2182.

In Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), this Court approved of the use of pre-Miranda silence to impeach a testifying defendant. This Court distinguished Doyle v. Ohio, observing that post-Miranda silence cannot be used against a defendant because of the implicit assurances contained in the Miranda warnings. The Court observed that Jenkins was not "lulled into a false sense of security that his silence would not be used against him", again confirming

the proscription against use of one's post-Miranda silence for impeachment purposes. 447 U.S. at 239-40.

Finally, in Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490, (1982), this Court held that arrest alone is not sufficient to implicate due process considerations and that only the giving of a Miranda warning or an equivalent affirmative assurance raises a fundamental fairness issue, citing Doyle v. Ohio. 445 U.S. at 606-07. Fletcher v. Weir specifically limited Doyle's holding to silence occurring after Miranda warnings and this Court remains steadfast in proscribing the use of post-Miranda silence for impeachment purposes.

This Court, on an Earlier Petition for Certiorari Involving the Same or Similar Questions and Substantially Identical Circumstances, Declined Review:

In State of Florida v. Burwick, supra, the Florida Supreme Court directly addressed the issue of whether evidence of a defendant's post-arrest, post-Miranda silence is admissible on the issue of sanity. In specifically disapproving of the Florida Second District Court Appeal decision in Greenfield, the Florida Supreme Court reasoned:

> "Regardless of the nature of the defense raised, the evidentiary doctrine in Hale remains intact. Post-arrest, post-Miranda silence is deemed to have dubious probative value by reason of the many and ambiguous explanations for such silence. ... Contrary to what Greenfield intimates, these ambiguities attendant to post-Miranda silence do not suddenly disappear when an arrestee's mental condition is brought into issue. ... For example, one could reasonably conclude that custodial interrogation might intimidate a mentally unstable person into silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on the assurances given during a Miranda warning and thereafter choose to remain silent." 442 So.2d at 948.

This Court denied the State of Florida's Petition for Certiorari in Florida v. Burwick. (Case No. 83-1316), ____ U.S. _____, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). The facts in Burwick were substantially identical to the facts in Greenfield.

Burwick presented an insanity defense and the state, in a successful rebuttal of that defense, introduced evidence that Burwick, after being advised of his Miranda rights, remained silent and requested an attorney. Not only did the Florida Supreme Court find the probative value of this evidence lacking because of the ambiguous explanations for silence, it reasoned:

> "To permit the state to benefit from the fruits of its own deceptions violates the due process clause of the Fourteenth Amendment and Article I, Section 9, of the Florida Constitution. 442 So.2d at 948

Now, a little more than one year after this Court declined to review Burwick, the State of Florida again asks this Court to visit this issue. The Petitioner cites no intervening authority and offers no justifications or explanations which would distinguish the instant case from Florida v. Burwick, and which would now justify certiorari review.

The Allegedly Conflicting Decisions are Distinguishable:

In Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. denied 460 U.S. 1043, 103 S.Ct. 1439, 75 L.Ed.2d 796 (1983), that Court was concerned only with the use of a defendant's post-Miranda request for an attorney. The case simply did not involve the use of a defendant's post-Miranda silence. In fact, that Court reasoned that "the deterent effect in this case is more tenuous than that stemming from admission of testimony about a defendant's refusal to give a statement to police." The Court found that the use of a defendant's request for counsel had only a "slight inhibiting effect on the constitutional right of silence", whereas jurors would be "quite likely to infer guilt from a defendant's refusal to give a statement to the police ...". 689 F.2d at 130. It should be noted that the Seventh Circuit in Sulie declined to adopt a rule of blanket admissibility, even with regard to a defendant's request for counsel.

In the instant case, not only was defendant's request for counsel utilized by the state, but on at least four occasions during his trial, his refusal to discuss the matter with police was elicited. Further, there is no indication in the Sulie case that the evidence was introduced in the state's case in chief, as in the instant case, or that the defendant's invocation of his constitutional rights was highlighted and argued to the jury by the prosecutor in his final argument, as in the instant case.

United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978) presents a closer question of conflict. However, it too is distinguishable on its peculiar facts. In that case, the Court specifically noted that "the government did not exploit post-arrest silence", citing United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99. 578 F.2d at 288. In light of this statement, it can be safely assumed that had the government exploited or highlighted Trujillo's post-Miranda silence, the Tenth Circuit would not have been so tolerant. In the Greenfield trial, however, as has been noted, the prosecutor, during final summation argued the significance of Greenfield's post-Miranda silence and request for an attorney, obviously in an attempt to infer meaning, to wit: sanity and guilt.

At page 14 in his Petition for Certiorari, Petitioner attempts to draw an analogy between his desired use of a defendant's post-Miranda silence and the use of illegally obtained evidence to impeach a defendant who perjures himself while testifying or who testifies inconsistently. However, none of the cases cited by Petitioner could possible justify the use of one's post-Miranda silence, in the face of the implicit assurances contained in the Miranda warnings. According to the Petitioner's convoluted theory, when a defendant raises insanity as a defense, the prosecution can disregard the assurances of the Miranda warnings and thereby benefit from the fruits of its own deception. As appealing as this may be in the interest of obtaining a conviction, such reasoning does wholesale violence to the holdings in Doyle v. Ohio, United States v. Hale, and Miranda v. Arizona.

Jacks v. Duckworth, 651 F.2d 480 (7th Cir. 1981), cited by Petitioner as being in conflict with the decision below, is also distinguishable on its facts. In that case, the prosecution offered the defendant's statement: "As regards what happened this evening, I want to talk to my attorney", made to a police officer after Miranda warnings. However, that court specifically noted that neither Doyle nor Hale was applicable because the case did not involve an attempt by the prosecutor to use the defendant's silence or failure to testify against him or for impeachment purposes. In fact, Jacks had not remained silent but had voluntarily and freely spoken with the police officer after having received his Miranda warnings.

At page 12 in his Petition for Certiorari, Petitioner suggests that Jacks v. Duckworth, supra, and Kaufman v. United States, 350 F.2d 408 (8th Cir. 1965), cert. denied 383 U.S. 951 (1966), stand as authority for the use of illegally obtained evidence for the purpose of rebutting an insanity defense. However, a close reading of Jacks reveals that Jacks testified and therefore the illegally obtained tape recording was properly utilized for impeachment purposes, in the face of supposed perjury. See: Harris v. New York, supra. That portion of the opinion in Jacks had nothing to do with the use of a defendant's post-Miranda silence. Similarly, Kaufman v. United States did not deal with the use of a defendant's post-Miranda silence but merely discussed and approved of the use of demeanor evidence as testified to by an agent who interviewed Kaufman after his lawyer had been appointed, in violation of Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Testimony was actually restricted to the facts that the agent had conferred with Kaufman and as to Kaufman's demeanor. Noting that the testimony served only as qualifying material for the agent's opinion evidence as to Kaufman's sanity, the Court observed that "this is far different from a defendant's own incriminating statement such as were introduced into evidence in Massiah ...". 350 F.2d at 416. Again, Kaufman had nothing to do with the use of one's post-Miranda silence.

At page 15 of his Petition, Petitioner argues that "there is no rational basis upon which to deny the trier of fact probative reliable evidence on the issue of guilt, or, at bar, on the continuing viability of Greenfield's affirmative defense." Petitioner goes on to cite authority for the proposition that the insanity defense presupposes that the accused has committed the offense. Petitioner overlooks two important aspects relevant to this Court's determination. First, Greenfield's counsel did not concede or admit that Greenfield had in fact committed the offense. Secondly, Petitioner presumes probative value of silence on the issue of insanity. While at first glance this may be an appealing suggestion, one has only to review the decision of the court below and the decision of the Florida Supreme Court in State of Florida v. Burwick, before concluding that silence is susceptible to various ambiguous explanations. Furthermore, Petitioner's logic cannot overcome the explicit ruling in Doyle that silence, in the wake of the implicit assurances of the Miranda warnings, cannot be used for impeachment purposes.

Petitioner did not Preserve for Review the Issue of Bypass under Wainwright v. Sykes:

This Court should not grant certiorari as to the second issue framed by Petitioner, questioning whether the decision of the Court below conflicts with Wainwright v. Sykes. Petitioner did not assign as error in the court below the issue he now asks this Court to review. Neither was the applicability of Wainwright v. Sykes considered by the Court below, other than parenthetically in a footnote to the decision.

The issue of waiver was fully litigated in the District Court. Evidentiary proceedings were held on the issue, Respondent presented a "cause" and "prejudice" defense to the allegation of waiver and the issue was resolved by the District Court against Petitioner. The Petitioner did not, as he had a right and obligation to do, file written objections to the proposed findings

and recommendations of the Magistrate, as required by 28 U.S.C. §636(b)(1), Local Rule 6.102, Rules for the United States District Court, Middle District of Florida and Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982)(en banc). Apparently satisfied with the adverse decision of the District Court on the merits, Petitioner did not raise the Wainwright v. Sykes, issue by way of cross-appeal or otherwise. Only belatedly, in his Petition for Rehearing to the Eleventh Circuit Court of Appeals, did Petitioner raise the issue. Having failed to assign the issue as error in the court below, Petitioner should not now be heard to complain. See: e.g. Haufman v. State of Missouri, 274 U.S. 21, 47 S.Ct. 485 (1927); Sonzinsky v. United States, 300 U.S. 506, 57 S.Ct. 554 (1937).

Review is not barred by Wainwright v. Sykes:

Because the Eleventh Circuit arguably treated parenthetically the Wainwright v. Sykes issue by virtue of its comments in footnote 1 of its opinion, Respondent, would, in the alternative, suggest that this Court deny the Petition for Certiorari with respect to issue no. 2 framed in the Petition for Certiorari, on the grounds that, (1) Respondent's counsel made appropriate objections and brought the issue to the attention of the state trial court in accordance with then-existing state procedural rules, (2) both the state trial court and state appellate court addressed the merits of the issue and (3) the record will reflect that there was adequate cause for any failure to object and Respondent suffered prejudice as a result of that cause.

Petitioner's contention that Greenfield has failed to make a contemporaneous objection is tenuous at best. Notwithstanding counsel's failure to object during the state's case in chief, he strenuously objected during the prosecutor's summation (TR-339). Since the prosecutor's remarks during summation were in themselves

violative of Doyle v. Ohio and were directed to the same testimony which came in without objection, it cannot be said that there has been a waiver under the rationale of Wainwright v. Sykes, since the related objection sufficiently raised the constitutional issue. See: e.g. Thomas v. Estelle, 582 F.2d 939 (5th Cir. 1978); Collins v. Auger, 577 F.2d 1107 (8th Cir. 1978), cert. denied 439 U.S. 1133 (1979).

Sykes deals "only with contentions of Federal law which were not resolved on the merits in a state proceeding due to one's failure to raise them as required by state procedure" 433 U.S. at 72, 97 S.Ct at 2507. Sykes creates no bar to independent determination in the Federal tribunal where the merits were reviewed by the state court. Id. Here, the state appellate court reached the merits of the constitutional issue in a two page opinion. It follows that there is no basis for determining that Greenfield has waived his right to Federal review under the Sykes decision. See: Lebowitz v. Wainwright, 670 F.2d 974 (11th Cir. 1982).

To the extent that Petitioner suggests that review is barred because Greenfield's trial counsel neglected to move for a mistrial in conjunction with his objection to the prosecutor's summation, Florida's requirements of a Motion for Mistrial is a matter of decisional case law and not a specific procedural rule. A Wainwright v. Sykes waiver must be from a specific state procedural rule. Freeman v. State, 599 F.2d. 65, 71 (5th Cir. 1979), cert. denied 444 U.S. 1013, 100 S.Ct. 661, 62 L.Ed.2d 641 (1980). Petitioner cites Clark v. State, 363 So.2d 331 (Fla. 1978) as authority for the procedural default. However, Clark was decided after Petitioner's trial. Furthermore, Clark decided only "... whether a contemporaneous objection is necessary to preserve as a point on appeal ..." 363 So.2d at 332. Regardless, Greenfield should not be held to the requirement of a decision which was rendered after his trial.

Finally, Petitioner overlooks a most significant aspect of this case. Greenfield has consistently complained of the prosecutor's use and comment upon his post-Miranda silence. Under Doyle, error is committed not only by the use of the post-Miranda silence but also by the prosecutor's comment thereon.

CONCLUSION

Based upon the foregoing, this Court should deny the Petition for Writ of Certiorari. The decision of the Court below follows a controlling decision of this Court and this Court has only recently denied review in a case involving substantially identical circumstances and issues.

RESPECTFULLY SUBMITTED,

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AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served on Ann Garrison Paschall, Assistant Attorney General, 1313 Tampa, Street, Suite 804, Park Trammell Building, Tampa, Florida 33602 by depositing said copy in the United States Mail, First Class Postage Pre-Paid, addressed to said counsel of record at her post office address, on this 17th day of April, 1985.

JAMES D. WHITTEMORE, ESQUIRE

SWORN TO AND SUBSCRIBED before me this 17th day of April, 1985.

Notary Public
My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires March 27, 1988.

(2)

No. 84-1480

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections
State of Florida

PETITIONER,

v.

DAVID WAYNE GREENFIELD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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1985; CERTIORARI GRANTED MAY 13, 1985.

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RECORD ENTRIES

1. David Wayne Greenfield was charged by information with sexual battery committed with force likely to cause serious personal injury on June 26, 1975. (SR 1, 2).*

2. Greenfield pled not guilty on July 11, 1975. (SR. 3).

3. Greenfield changed his plea to not guilty by reason of insanity on August 15, 1975. (SR. 4).

4. Jury verdict of guilty was entered on October 15, 1975.

5. Greenfield was adjudicated guilty and sentenced to life imprisonment in an order filed November 21, 1975. (SR 7).

*References to the State trial record have been designated SR followed by the appropriate page number.

6. Second District Court of Appeal affirmed judgment and sentence on September 24, 1976 and denied rehearing on October 25, 1976. Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976). (JA 56 - 66).

7. Florida Supreme Court granted certiorari on March 7, 1977 and remanded the case to the Second District for proceedings consistent with Clark v. State, 363 So.2d 331 (Fla. 1978)(JA 67 -68).

8. Second District Court of Appeal reaffirmed its original opinion on October 1, 1979).(JA 69 - 70).

9. Greenfield filed a habeas corpus petition in the United States District Court for the Middle District of Florida on March 11, 1980. (R 1).

10. The United States District Court denied the habeas corpus petition on

January 25, 1983. (R 185).

11. Petitioner filed a timely notice of appeal to the Eleventh Circut Court of Appeals. (R 188)

12. The United States Court of Appeals for the Eleventh Circuit filed its opinion on September 6, 1984 and denied rehearing on January 28, 1985. (JA 4 - 46).

David Wayne GREENFIELD, etc.,

Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, etc., et al.,

Respondents-Appellees.

No. 83-3111.

United States Court of Appeals,

Eleventh Circuit.

September 6, 1984.

Petitioner sought habeas corpus relief following state court conviction. The United States District Court for the Middle District of Florida, William J. Castagna, J., denied relief, and he appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that prosecutor's argument to jury that petitioner's postarrest silence showed him to be sane violated his Fifth and Fourteenth

Amendments right to a fair trial.

Reversed with instructions.

1. CRIMINAL LAW 1036.1(3)

Defendant's failure to object at trial to admission of his post*Miranda* warning silence as substantive evidence to rebut his insanity defense did not preclude his right to seek apellate review of the evidence's admissibility where he later made 20 objections to prosecutor's attempt to argue that evidence to the jury.

2. CRIMINAL LAW 407(1)

Defendant's post*Miranda* warning silence was inadmissible as substantive evidence to rebut his defense of insanity at time of offense, as it was not probative of defendant's sanity, and his assertion of insanity, through psychiatric testimony, made no reference to his conduct at

time of arrest and did not constitute perjury, so that door was not opened to prosecutor's use of his silence. U.S.C.A. Const.Amends. 5, 6

3. HABEAS CORPUS 113(12)

Court of Appeals must find a constitutional error harmless beyond reasonable doubt before it can affirm district court's denial of writ of habeas corpus.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, TJOFLAT and HENDERSON, Circuit Judges.

TJOFLAT, Circuit Judge:

David Wayne Greenfield was convicted after a jury trial in Florida state court of sexual battery committed with force likely to cause serious personal injury.

He was sentenced to life imprisonment. In this habeas corpus action, he raises one issue, whether the prosecutor's argument to the jury that Greenfield's post-arrest silence showed him to be sane violated his fifth and fourteenth amendments right to a fair trial. The district court denied relief; we reverse.

I.

On June 21, 1975, petitioner was walking on a path through the woods to Lido Beach, near Sarasota, Florida. He passed a young woman coming from the beach, who smiled and said something to him about the weather. After he passed her, he turned and choked her from behind, dragged her into the woods and forced her to engage in oral sex. Afterwards he made several inconsistent statements, among them: "I don't know why I did this. I

know why I did this." He smoked a cigarette that belonged to the woman and then found her car keys for her.

After Greenfield released her, the woman drove directly to the police station and made a report, describing petitioner's attire and saying that his legs were badly sunburned. An officer returned to the beach two hours after the assault and found petitioner walking on the beach. He told petitioner he was investigating a crime that had occurred on the beach and asked petitioner to raise his pants legs. Upon seeing that petitioner's legs were burned, he placed petitioner under arrest. Petitioner voluntarily walked to the police car and, after being advised of his Miranda rights, stated that he wanted to speak to an attorney. Otherwise he was silent. Later that day, when another

officer again advised petitioner of his rights and asked him if he wished to talk, petitioner only stated that he wanted to speak with an attorney. After speaking with a public defender, petitioner once again declined to talk with the police.

Petitioner was charged with sexual battery, Fla.Stat.Ann. §794.011(3)(1975), and pled not guilty. He later changed his plea to not guilty by reason of insanity. He went to trial on October 15, 1975. In petitioner's opening statement to the jury, his attorney indicated that he would put the prosecution to its proof of the events and, as a defense, would produce evidence of his client's insanity.

[1] In its case-in-chief, the prosecution called the victim, the investigating police officers, and the doctor who examined the victim shortly after the

assault. Two of the officers testified that petitioner had requested a lawyer after being advised of his Miranda rights, but had otherwise remained silent. The defense made no objection to this testimony.[1] At the close of the state's case petitioner moved for a judgment of acquittal. The court denied the motion.

The defense called two psychiatrists, Drs. Lose and Piotrowski, both of whom testified that petitioner had demonstrated classic symptoms of paranoid schizophrenia

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1 Under these circumstances the petitioner's failure to object to the introduction of this evidence did not preclude his right to seek appellate review of the evidence's admissibility because he later made 20 objections to the prosecutor's attempt to argue the evidence to the jury. This can be inferred from the Florida District Court of Appeal's willingness to address the merits of the admissiblity issue during its review of the prosecutor's closing argument to the jury. See Greenfield v. State, 337 So.2d 1021, 1022-23 (Fla.Dist.Ct.App. 1976).

during their interviews with him. Each doctor stated that in his opinion petitioner was not able to distinguish right from wrong at the time of the alleged crime.[2] Dr. Lose mentioned that he had prescribed thorazine, a drug that diminishes the symptoms of schizophrenia, for petitioner while he was in prison. Schizophrenics can tolerate the drug in substantial amounts; normal individuals given such dosages become extremely drowsy. Petitioner responded positively to the treatment.

In rebuttal, the state called a psychiatrist who testified that in his

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2 In its charge to the jury at the end of the trial, the court instructed the jury to find the defendant legally insane if he was "by reason of mental infirmity unable to understand the nature of his act or its consequences or was incapable of distinguishing that which is right from that which is wrong."

opinion petitioner was not a paranoid schizophrenic and was able to distinguish right from wrong at the time he committed the offense. The psychiatrist based this opinion on his examination of petitioner, conducted while petitioner was under the influence of thorazine. He testified, however, that thorazine would have made petitioner's symptoms worse rather than better. After the rebuttal, petitioner renewed his motion for a judgment of acquittal, which was denied.

In his summation to the jury, the prosecutor presented, over petitioner's objection, the following argument:

> Let's go on to Officer Pilifant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow [petitioner] on the beach and that he went up to him, talked to him, and then arrested him for the offense. The fellow voluntarily

> put his arms behind his back and said he would go to the car. This is supposedly an insane person under the throws [sic] of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Mranda [sic] rights. Does he say he doesn't understand them? Does he say "What's going on?" No. He says "I understand my rights. I do not want to speak to you. I want to speak to an attorney." Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down--as going down the car as you recollect Officer Pilifant said he explained what Miranda rights meant and the guy said--and Mr. Greenfield [the petitioner] said "I appreciate that, thanks a lot for telling me that." And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley--He's down there. He says, "have you been read your Miranda rights?" "Yes, I have." "Do you want to talk?" "No." "Do you want to talk to an attorney?" "Yes." And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant . . .

> So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity.

The jury found the petitioner guilty as charged, and the judge sentenced him to life imprisonment. Petitioner moved the court for a new trial or judgment of acquittal notwithstanding the verdict, citing the prosecutor's comment on petitioner's post arrest silence. The court denied the motion.

Petitioner appealed his conviction to the Florida Second District Court of Appeal, contending in part that the trial court erred in denying his motion for a new trial based upon the prosecutor's use of petitioner's post-Miranda warning silence. The court affirmed the conviction. Greenvield v. State, 337 So.2d 1021 (Fla. Dist.Ct.App. 1976). The Florida Supreme Court granted certiorari and remanded the

case to the district court of appeal for further proceedings consistent with its decision in Clark v. State, 363 So.2d 331 (Fla. 1978).[3] The district court of appeal reaffirmed its original opinion. Petitioner then filed this petition for a writ of habeas corpus in the federal district court.

After hearing evidence regarding whether Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), barred consideration of the post-arrest silence issue, the magistrate recommended to the district court that the issue not be

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3 In Clark v. State, 363 So.2d 331 (1978), the Florida Supreme Court held that improper comments on the defendant's exercise of his right to remain silent is "constitutional error," but not "fundamental error." Accordingly, a contemporaneous objection at trial to the introduction of or comment upon such evidence is required to preserve the issue for appeal.

considered barred by Wainwright v. Sykes, since the state appellate court had reached the merits of petitioner's claim, but that it be dismissed on the merits. Petitioner timely filed objections to the recommendation. The district court adopted the magistrate's recommendations and denied the petition.[4] This appeal followed.

II.

In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the Supreme Court held that the prosecutor's use of the defendant's post-arrest, post-Miranda warning silence, not as evidence

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4 The district court made no findings of fact; rather, it determined from the record of his state trial proceedings that petitioner's claim was insufficient as a matter of law. Accordingly, we examine the record of the state trial proceedings, as did the district court, to determine whether petitioner was denied the constitutional right now in issue.

of guilt,[5] but solely to impeach the credibility of the defendant's alibi testimony violated the due process clause of the fourteenth amendment. The Court gave two reasons for its holding. First, a defendant's silence has low probative value because it is "insolubly ambiguous." 426 U.S. at 617, 96 S.Ct. at 2244. The ambiguity arises because Miranda

> require[d] that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights.

Id. Second, the Miranda warnings should

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5 Even the dissenters in Doyle agreed that the evidence was inadmissible to show guilt; in their opinion it could only be used to attack the defendant's credibility.

not be read to impose a hidden penalty on one who chooses to rely on them.

> [W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation [of the crime] subsequently offered at trial.

Id. at 618, 96 S.Ct. at 2245 (footnote omitted). These two concerns[6] provide

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[6] The problem of the extent to which a person can be compelled to incriminate himself testimonially without fifth amendment protection, see Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)(fifth amendment does not protect defendant against compelled "self-incrimination" by seized blood sample), is related. Petitioner's silence here should not be analyzed as behavior showing physical evidence of sanity. Unlike the physical evidence in Schmerber (blood), silence is inextricably tied to the testimonial option which the fifth amendment protects, that is, the option

the framework within which we must judge petitioner's claim.

The Supreme Court has placed some gloss on the right articulated in Doyle. In Doyle itself the Court noted that testimony that a defendant had remained silent would be admissible to rebut the defendant's story that he had spoken with police after his arrest. In Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), the Court held that the admissibility of pre-arrest, pre-Miranda warning silence to impeach the defendant's

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not to incriminate oneself testimonially. Silence may not technically be "testimonial" or "communicative"; however, neither is it physical evidence. It occupies a unique place in that it shows a mental decision not to be testimonial or communicative. If such "conduct" is not protected, no fifth amendment protection would exist. There would be no alternative to self-incrimination. One would simply choose whether to incriminate himself by inference from silence, or by verbal means.

testimony in a state court proceeding is a state evidentiary law question; admission of the evidence would not violate the U.S. Constitution because the implicit assurance of the Miranda warning was not present In Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the Court similarly held that the admissibility of post-arrest, but pre-Miranda warning statements to impeach the defendant's testimony did not violate the fourteenth amendment but was rather a state evidentiary decision. The Court has not discussed the issue we now face: the admissibility of a defendant's post-Miranda warning silence when offered not to impeach, but, rather, as substantive evidence to rebut his defense of insanity at the time the offense. In evaluating this claim, we first examine the extent to

which the two factors relied upon by the Doyle court are present in this case.

A.

[2] We first examine the probative value of the evidence. The State argues here that petitioner's silence and request for a lawyer was highly probative of his sanity. We are not convinced.

Insanity is a broad term convering a variety of mental and emotional diseases or defects that prevent the criminal from formulating the requisite punishable intent when he commits a criminal act. The level of lucidity under which an insane person operates may vary with time. Symptoms of insanity also vary widely, with the specific disease and with time, ranging from complete withdrawal (which is often marked by silence) to violent rages. A person's apparent level of comprehension

may not always correspond to his level of sanity at the time. Accordingly, the probative value of a person's post-arrest, post-Miranda warning silence in determining his sanity at the time of the crime will vary markedly with the disease he has, the symptoms he tends to exhibit, and the closeness in time between the arrest and warning and the crime.

Here two psychiatrists considered petitioner to be a paranoid schizophrenic. At trial, psychiatric testimony suggested that such a person is often quiet. Paranoid schizophrenics, the doctors noted, are often capable of spawning complex, rational plans of action, although they operate under delusions. For example, the State's psychiatrist noted that a paranoid schizophrenic might dream up an elaborate, coherent plan to murder his neighbor,

based on the delusion that the neighbor was a KGB agent trying to assassinate him. For petitioner to have consistently asked for a lawyer and refused to speak with police, then, might only reflect his paranoia that the authorities were persecuting him even though he was innocent.

As the Supreme Court of Florida noted in finding post-arrest, post-Miranda warning silence not probative of insanity:

> [T]hese ambiguities attendant to post-Miranda silence do not suddenly disappear when an arrestee's mental condition is brought into issue . . [o]ne could reasonably conclude that custodial interrogation might intimidate a mentally unstable person into silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on . . . a Miranda warning.

State v. Burwick, 442 So.2d 944, 948 (Fla. 1983), cert. denied, __ U.S. __, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). In this case, the evidence was probative only

of petitioner's ability to understand English[7] and to remain calm, which would be consistent with the mental disease of paranoid schizophrenia. The evidence accordingly was not probative of petitioner's sanity.

B.

We next turn to the concern expressed by the Supreme Court in Doyle that the defendant not be penalized for exercising his right to silence in view of the implicit assurance the Miranda rights give that, if the arrestee chooses not to speak, his silence will not be used against him. This concern was reiterated

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[7] Had petitioner's particular disorder been that he considered himself to be the literary Don Juan and understood only Spanish when he was in a delusional period, the probative value of his response to the officer's English warnings would have been much higher.

in Fletcher, 455 U.S. at 607, 102 S.Ct. at 1312, where the Court stated that "the sort of affirmative assurance embodied in the Miranda warnings" gives rise to a due process violation when post-warning silence is used by the prosecutor.

We first note that nothing in the Miranda "assurances" given to petitioner limited them to the instance where guilt, rather than insanity, would be the trial issue. In this respect petitioner's situation was identical to that of Doyle. Petitioner's silence was used against him at trial after he asserted his right to silence. He received no prior indication that he could be so penalized for maintaining silence; indeed, in the Miranda warnings he was implicitly assured that he would not be so penalized.

Further, petitioner's silence was not

admissible under the well-established exception noted in Doyle, that otherwise inadmissible evidence may come in where the defendant takes the stand and perjures himself regarding such evidence, 426 U.S. at 619, n. 11, 96 S.Ct. at 2245, n. 11; for petitioner never testified that he did not remain silent. Petitioner's assertion of insanity, through psychiatric testimony, made no reference to his conduct at the time of the arrest, did not constitute perjury, and therefore did not open the door to the prosecutor's use of post-Miranda silence as permitted by Doyle.

C.

Having examined both factors emphasized by the Doyle Court in the context of the facts before us, we discuss how they should be synthesized. The Seventh and Tenth Circuits, in analyzing similar

situations, have decided that the Doyle decision is inapposite in the context of an insanity defense. The Seventh Circuit has so held explicitly, Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. denied, __ U.S. __, 103 S.Ct. 1439, 75 L.Ed.2d 796 (1983); the Tenth Circuit, in United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied, 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978), has implicitly agreed.[8]

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[8] It is interesting to note that the two cases Trujillo relied on for its conclusion that post-Miranda silence or requests for a lawyer are admissible to show sanity do not directly support that conclusion. One, United States v. Julian, 450 F.2d 575 (10th Cir. 1971), specifically states that admission of post-arrest silence to show mental competence would have "a completely false premise in fact or law." Id. at 579. The court permitted evidence of the defendant's conduct at the time of his arrest only when the defense psychiatrist testified that the defendant "was trying to be arrested," because the

In Trujillo, a government agent testified that he read Trujillo his Miranda rights, Trujillo requested a lawyer, the agent continued to question Trujillo, and Trujillo told the agent his name, social security number, education, and parents' addresses. The government apparently never argued at trial that Trujillo's responses should be considered evidence of his sanity. The court of appeals determined, however, that the evidence was properly admitted because it was pertinent to the insanity claim, noting that in these circumstances, including that "the government did not exploit post-arrest silence,"

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defendant's conduct tended strongly to show that he was not trying to be arrested. In the second case, United States v. Coleman, 501 F.2d 342 (10th Cir. 1974), the defendant never challenged the admission of his post-arrest silence and request for a lawyer. Both of these cases were decided prior to Doyle.

the danger of unfair prejudice [was] minimal and the probative value substantial." Id. at 288.

The Sulie court employed a more lengthy analysis. There, the prosecutor called an officer to testify that the petitioner, after receiving the Miranda caution, requested a lawyer. The evidence was used to show that the petitioner was sane at the time he committed the crime. The court of appeals used a two-prong test in approving the evidence. First, it decided without examining the particular circumstances of that defendant's illness that the probative value, to show petitioner's sanity, of the evidence that petitioner requested a lawyer was "great." 689 F.2d at 131. Second, it examined "how much the exercise of the right to remain silent would be deterred if a suspect knew

that a request for a lawyer could be used as evidence of his sanity." Id. at 130. The court concluded that, since few defendants raise an insanity defense and fewer still are planning their defenses when they are arrested, the suspect's knowledge that his request for a lawyer could be used against him to show his sanity would have only a slight inhibiting effect on the exercise of the right to counsel. Noting that the prosecution needed all the evidence of sanity it could get, the court found the testimony to have been properly admitted.

We disagree with the conclusion of both appellate courts that evidence of a post-Miranda warning silence or counsel request is generally highly probative of sanity at the time of the offense. We also disagree with the appropriateness,

after Doyle, of the Sulie court's second inquiry.

The Sulie court analyzed the probative value of the request as follows: "Where evidence that the defendant asked for a lawyer is used to prove . . . guilt, its probative value is slight (it is not true that only a guilty person would want to have a lawyer present when he was being questioned by the police); but here it was great." 689 F.2d at 131. The flaw in this logic--as the record in this case shows--is that it is not necessarily true that only a sane person wants a lawyer present when he is being questioned by the police. An excessively paranoid individual, in particular, may want any protection from the police that he can get. As we have previously stated, probative value of the conduct to show sanity in part

depends on the nature of the alleged insanity, and, in most circumstances, we cannot conceive that the probative value as to sanity would be significantly greater than the probative value as to guilt or as to credibility in asserting an alibi defense.

The second point analyzed in Sulie, what impact use of post-Miranda conduct to show sanity may have on criminal suspects in general, sidesteps the point made in Doyle. The particular suspect, having been implicitly assured that his silence will not be used against him at all and quite likely relying on that assurance, is penalized at trial for exercising his right to remain silent when his silence is used against him as evidence of his sanity. It might well be that, if suspects were told that their post-Miranda warning

silences could be used to show their sanity, most suspects would pursue the same course of action. However, until and unless we correctly set out for the particular suspect how his right is limited, we penalize him for exercising his right to silence by an after-the-fact assertion of a limitation on the right. We agree with Judge Cudahy's dissent in Sulie that the appropriate inquiry in this type case is not whether defendants generally will be inhibited from exercising their fifth amendment rights, but rather whether the particular defendant has been penalized for exercising such rights and whether he has been harmed by the penalty. This is consistent with the position taken by the Supreme Court in Doyle, where the Court focused on whether Doyle himself had been harmed, not on the broad inhibitory

effects on the right to remain silent. Similarly, in Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Court held that a prosecutor could not comment on a defendant's failure to testify at trial because it imposed a penalty on his exercise of his fifth amendment privilege not to incriminate himself. 380 U.S. at 619, 85 S.Ct. at 1232. The Court did not look at the inhibitory effect of prosecutorial comment on defendants exercising the right generally. The Third Circuit described the proper inquiry to be "whether the particular defendant has been harmed by the state's use of the fact that he engaged in constitutionally protected conduct, not whether, for the particular defendant or for persons generally, the state's reference to such activity has or will burden

the exercise of the constitutional right." United States ex rel. Macon v. Yeager, 476 F.2d 613, 616 (3rd Cir.), cert. denied, 414 U.S. 855, 94 S.Ct. 154, 38 L.Ed.2d 104 (1973) (emphasis in original).

In this case, we feel that adherence to the Doyle analysis is appropriate and that it requires us to send petitioner back to the state courts for retrial. Petitioner exercised his rights to remain silent and to request counsel. He did so in circumstances having no more probative value as to sanity than the circumstances in Doyle had as to guilt; in both situations the silence was "insolubly ambiguous." Petitioner exercised his rights to silence and to counsel after receiving the same implicit assurance Doyle received that his silence would not be used against

him.

Moreover, as we have pointed out, unlike in Doyle, petitioner did not take the stand. Any use of his silence was as substantive evidence against him, a use that even the Doyle dissenters would have decried. This case can not fall under the exception of a defendant using the fifth amendment as a shield for perjury because the defendant never took the stand. His experts likewise did not place his conduct at the time of his arrest directly in issue in the opinions they expressed.[9]

[3] We now turn to the question of whether the prosecutor's argument

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9 We do not determine, here, if or when such silence might appropriately be used to impeach on cross-examination a defense psychiatrist who raised the defendant's behavior with police at the time of or after his arrest and Miranda warning as evidence of insanity. We note only that this issue is not presented in this case.

constituted harmless error. We must find a constitutional error harmless beyond a reasonable doubt before we can affirm the district court's denial of the writ. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The prosecutor relied strongly on the petitioner's conduct as evidence of sanity; his closing argument was not lengthy and the portion challenged here was not minor. We cannot say that the error was harmless beyond a reasonable doubt.

The judgment of the district court is reversed. On remand, the district court shall issue the writ, calling for the state to retry the petitioner within a reasonable time (to be determined by the district court) or to discharge him.

REVERSED, with instructions.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3345

DAVID WAYNE GREENFIELD,

Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT, Secretary
Florida Department of
Offender Rehabilitation

Respondent-Appellee

Appeal from the
United States District Court
For the Middle District of Florida
Tampa Division

PETITION FOR REHEARING

JIM SMITH
ATTORNEY GENERAL

ANN GARRISON PASCHALL
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

CERTIFICATE OF INTERESTED PARTIES

Not applicable. See 11th Cir. R. 22(f)(2).

ARGUMENT AND AUTHORITIES

COMES NOW the Respondent/Appellee, LOUIE L. WAINWRIGHT, by and through the undersigned Assistant Attorney General and pursuant to Rule 40, Federal Rules of Appellate Procedure, and 11th Cir. R. 26, petitions this Court for rehearing in the above styled cause and as grounds therefore alleges that this Court failed to give due consideration to the applicability of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) in the case at bar.

It is beyond dispute that Petitioner never contemporaneously objected to the testimony of Officers Jolley and Pilifant regarding Petitioner's post-Miranda

conduct. It is only when the prosecutor argued this evidence to the jury that Petitioner's counsel saw fit to object -- once (T.R. 339). This Court has stated, in its opinion in this cause:

> Under these circumstances the Petitioner's failure to object to the introduction of this evidence did not preclude his right to seek appellate review of the evidence's admissibility because he later made 20 objections to the prosecutor's attempt to argue the evidence to the jury. Greenfield v. Wainwright, __ F.2d __ (11th Cir. 1984) at slip opinion p. 5147, footnote 1.

While Respondent questions the conclusion that the mere nuber of subsequent objections can excuse a non-compliance with Florida's contemporaneous objection rule and thus avoid the Wainwright v. Sykes bar, Respondent must also note that a review of the record discloses one not twenty trial objections to the prosecutor's argument on this point. That objection is contained at page 339 of the state trial

transcript. The trial transcript further reflects Petitioner's failure to move for a mistrial at the time the allegedly improper argument was made.

It is clear, as a matter of Florida law that if a defendant, at the time an improper comment is made, does not move for mistrial, he cannot, after trial, in the event he is convicted, expect a reversal on appeal. A defendant will not be allowed to await the outcome of the trial with the expectation that if he is found guilty, his conviction will be automatically reversed. Clark v. State, 363 So.2d 331 (Fla. 1978).

The failure of a litigant to raise a claim at trial or on direct appeal in accordance with the procedural requirements imposed by the state will preclude consideration of that claim by the Federal

District Courts in a habeas corpus proceeding brought pursuant to U.S.C. §2254. Wainwright v. Sykes, supra; Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 7823, 102 S.Ct. 1558 (1982), reh. denied, 73 L.Ed.2d 1296 (1982); Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983); Hall v. Alabama, 700 F.2d 1333 (11th Cir. 1983); Forman v. State, 633 F.2d 634 (2nd DCA 1980), cert. denied, 450 U.S. 1001 (1981) and Grizzell v. Wainwright, 692 F.2d 722 (11th Cir. 1982). This is true whether the default occurred at trial and/or appeal and extends to constitutional as well as non-constitutional claims. Engle v. Isaac, supra.

Respondent has consistently argued that the Second District Court of Appeal addressed the merits of Petitioner's claim only in the alternative, after first

noting Petitioner's failure to object to the testimony of Officers Pilifant and Jolley. See Greenfield v. State, 337 So.2d 1021 (Fla. 2d DCA 1976). On remand the district court reaffirmed its original opinion and held that it was consistent with Clark v. State, supra. Since Clark expounds the contemporaneous objection rule under discussion it is not reasonable to assume that the Second District Court of Appeal would find its decision consistent with Clark unless it had, in fact, considered Petitioner's claim not properly preserved for appellate review.

Respondent would respectfully urge this court to re-examine the record and the procedural history of this cause and hold that Petitioner's claim is barred by Wainwright v. Sykes, supra, due to his failure to object to the officers'

testimony and his failure to timely move for a mistrial.

CONCLUSION

Based on the foregoing argument and authorities, Appellee respectfully requests that this Court grant rehearing in the above-styled cause.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

[s] Ann Garrison Paschall
ANN GARRISON PASCHALL
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR
RESPONDENT/APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to James D. Whittemore, Esquire, 412 Madison Street, Suite 1207, Tampa, Florida 33602, this 24th day of September, 1984.

[s] Ann Garrison Paschall
OF COUNSEL FOR
RESPONDENT/APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3111

DAVID WAYNE GREENFIELD,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, et al.,

Respondent-Appellees.

Appeal from the United States Court
For the Middle District of Florida

ON PETITION FOR REHEARING
(September 6, 1984)

Before GODBOLD, Chief Judge, TJOFLAT and HENDERSON, Circuit Judges.

PER CURIAM:

The petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

[s]
UNITED STATES CIRCUIT JUDGE

(Order Filed January 28, 1985)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DAVID WAYNE GREENFIELD,
#051271,

Petitioner,

vs CASE NO. 80-290-CIV.T.WC.

LOUIE L. WAINWRIGHT,
Secretary, Department
of Corrections, State
of Florida,

Respondent.

REPORT AND RECOMMENDATION

THIS CAUSE came on for consideration of a petition for writ of habeas corpus filed by as State prisoner, DAVID WAYNE GREENFIELD, pro se, in forma pauperis, pursuant to 28 U.S.C. §2254.[1]

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[1] This matter comes before the undersigned pursuant to the Standing Order of this Court dated April 6, 1979. See also Local Rule 6.01(c)(17).

On June 26, 1975 in Case No. 75-425-CF-A-01 in the Circuit Court in and for Sarasota County, Florida, Petitioner was charged by information with sexual battery committed with force likely to cause serious personal injuyr, contrary to §794.02 (2), Fla. Stat. (1975). On October 15, 1975, Petitioner was convicted after jury trial. He was adjudicated guilty and on November 21, 1975 was sentenced to life imprisonment.

Petitioner originally entered a plea of not guilty. Subsequently, his attorney entered a change of plea to not guilty by reason of insanity.

On October 16, 1975, Petitioner filed a motion for new trial or in the alternative for a judgment notwithstanding the verdict. He argued that the court had erred in allowing the prosecutor to

comment on the defendant's refusal to give a statement to police officers after the defendant was advised of his Miranda warnings and right to remamin silent. The trial court, after hearing argument, denied the motion.

On direct appeal, Petitioner contended that the trial court erred in refusing to grant a motion for new trial on the ground that the prosecutor had commented on his exercise of his right to remain silent during closing argument. The Second District Court of Appeal affirmed Petitioner's conviction with a written opinion. See, Greenfield v. State, 337 So.2d 1021 (2d DCA 1976); rehearing denied October 25, 1976. The Florida Surpeme Court, upon a petition for writ of certiorari, granted certiorari and remanded the case back to the Second District Court of

Appeal for further proceedings consistent with its decision in Clark v. State, 363 So.2d 331 (Fla. 1978). See Greenfield v. State, 364 So.2d 885 (Fla. 1978). Thereafter the Second District Court of Appeal affirmed its original opinion. See, Greenfield v. State, unreported Order entered October 1, 1979, copy in file.

This petition for writ of habeas corpus followed. Counsel was appointed to represent the indigent Petitioner and a Pre-Trial Stipulation was entered. Respondent does not contend that Petitioner has failed to exhaust available State remedies.

The sole issues raised by the parties are:

a. Whether Petitioner was denied due process of law by the prosecutor's use of and reference to defendant's post-

arrest silence during 1) trial and 2) final argument; and

b. Whether the holding in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), bars review of Petitiner's claim.

The facts in this case, simply stated, are that Petitioner, identified and arrested shortly following a sexual assault, upon receiving Miranda warnings, requested an attorney and made no statement. The prosecutor elicited testimony of the officer disclosing Petitioner's request for counsel in an attempt to overcome Petitioner's defense of insanity. Petitioner claims violation of his rights under Doyle v. Ohio, 426 U.S. 610 (1976). Respondent claims an exception to the Doyle rule under Harris v. New York, 401 U.S. 222 (1971).

Only one fedeal appellate court panel has met this issue squarely. In Sulie v. Duckworth, __ F.2d. __ (7th Cir. 1982), 32 Cr.L. 4046, under material facts the same as in the instant case, the court held the state may show that a defendant who raises the insanity defense was sufficiently lucid to ask for a lawyer, outweighing the slight effect this testimony will have on the constitutional right of silence. (A copy of the Sulie opinion is attached hereto as Appendix 1). Based on the Sulie decision, and the reasoning of the majority expressed therein, I recommend that the petition be DENIED.[2]

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[2] Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. 636(b)(1). Local Rule 6.02; Nettles v. Wainwright, 677 F.2d 404, (5th Cir. 1982)(en banc).

Respondent also seeks dismissal of Petitioner's claim for failure to object at time of trial. The record is clear that the Petitioner did object to the prosecutor's closing argument reference to Petitioner's request for counsel and failure to make any other statement. The record is further clear that the Florida Second District Court of Appeals reached the merits of Petitioner's claim both in the original opinion and upon remand. Accordingly, the Petitioner is not barred from raising the issue in this Court.

This 29th day of October, 1982.

[s]
PAUL GAME, JR.
UNITED STATES MAGISTRATE

(Appendix one to Magistrate Game's opinion is omitted by Petitioner.)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DAVID WAYNE GREENFIELD,

Petitioner,

vs. CASE NO. 80-290-CIV-T-WC

LOUIE L. WAINWRIGHT,

Respondent.

ORDER

This cause came on for consideration of a petition for writ of habeas corpus filed by a State prisoner, David Wayne Greenfield, pro se, in forma pauperis, pursuant to 28 U.S.C. §2254.

The matter was considered by the United States Magistrate, pursuant to general order of assignment, who has filed his report recommending that the petition be denied.

Upon consdieration of the report and

recommendation of the Magistrate and upon this Court's independent examination of the file, the Magistrate's report and recommendation is adopted and confirmed and made a part hereof. Therefore, it is

ORDERED:

1. The petition for writ of habeas corpus is denied.

DONE AND ORDERED at Tampa, Florida this 25th day of January, 1983.

[s]
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT
JULY TERM, A.D. 1976

DAVID WAYNE GREENFIELD,

Appellant,

v. CASE NO. 75-1731

STATE OF FLORIDA,

Appellee.

Opinion filed September 24, 1976

Appeal from the Circuit
Court for Sarasota County;
Roy E. Dean, Judge.

Jack O. Johnson, Public Defender,
Robert H. Grizzard, II, Assistant
Public Defender, and Paul J. Martin,
Legal Intern, Bartow, for Appellant.

Robert L. Shevin, Attorney General,
Tallahassee, and William I. Munsey,
Jr., Assistant Attorney General,
Tampa, for Appellee.

McNULTY, Chief Judge.

On this direct appeal appellant

Greenfield assails his conviction of sexual battery. The sole issue on appeal relates to the denial of a motion for new trial predicated on the ground that the prosecutor prejudicially commmented in summation on appellant's exercise of his right to remain silent at the giving of his Miranda rights at the time of his arrest. We affirm.

Most significantly, in this case, appellant pleaded not guilty by reason of insanity. Accordingly, there was no real dispute as to the essential objective facts herein. They are that the prosecutrix, having sunned hereself on a local beach in Sarasota in the late morning or early afternoon on the day of the offense, was returning to her car because of the threat of rain. It was necessary that she pass through a wooded area bordering the

beach. While in this wooded area she was accosted by appellant and dragged to a more secluded area of the beach where the sexual assault occurred. Upon her release by appellant the prosecutrix drove immediately to the police station and reported the incident, describing appellant. A police officer promptly returned to the scene of the assault and in the vicinity thereof spotted appellant as one fitting in considerable detail the description given by the prosecutrix. He arrested appellant and read him his Miranda rights.

The officer testified that he explained these rights, that appellant thanked him for explaining the, and that appellant said he understood them and did not wish to speak to the officer until he spoke to an attorney. Shortly thereafter at the police station appellant was again

interviewed by other officers, again reminded of his rights and again he reiterated that he did not wish to speak to the officers, that he wanted to speak to an attorney. In fact, he was permitted to and did call an attorney. No objection was made to the introduction of this evidence relating to the giving of the Miranda rights and to appellant's responses thereto.

During closing arguments, however, the prosecutor made the following comments:

> "But let's go on from what she stated. Let's go on to Officer Pilafant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow on the beach and that he went up to him, talked to him and then arrested him for the offense. The fellow voluntarily put his arms behind his back and said he would go to the car.

This is supposedly an insane person under the throes of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say 'What's going on?' No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down--as going down [in] the car as you recollect Officer Pilafant said he explained what Miranda rights meant and the guy said--and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley--he's down there. He says, 'Have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk?' 'No.' 'Do yo want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant."

At this point, counsel for defendant

strenuously objected on the basis that such comments were improper references to appellant's insistence on his Fifth Amendment right to silence. We cannot agree.

While we do agree that, at least in the face of an objection, testimony or prosecutorial comment relating to a defendants insistence on his right tc remain silent generally constitutes reversible error,[1] we are of the view that under the circumstances of this case the general rule ought not apply.

When insanity is raised by plea as a defense, and evidence thereof is forthcoming prima facie sufficient to raise a

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[1] Shannon v. State (Fla. 1976), __ So.2d __ (Case No. 47-611, Opinion filed June 30, 1976); Bennett v. State (Fla. 1975), 316 So.2d 41; Clark v. State (Fla. App. 2d, 1976) __ So.2d. __ (Case No. 74-889, Opinion filed July 28, 1976).

reasonable doubt, the state no longer can travel on the presumption of sanity; it must establish sanity beyond a reasonable doubt as with every element of the offense charged.[2] Certainly, evidence of the conduct and apparent state of mind and awareness of an accused, particularly where, as here, it is connected closely in point of time to the crime charged, is relevant to this issue; and it would be manifestly unfair to permit a defendant prima facie to establish a defense and then preclude the state from meeting it by barring relevant evidence to the contrary because of the "Miranda" rationale.[3]

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2 See, e.g., Farrell v. State (Fla. 1958), 101 So. 2d 130; Byrd v. State (Fla. App. 2d, 1965), 178 So.2d 886.

3 Cf. Harris v. New York (1971), 401 U.S. 222, 91 S.Ct. 643.

Here, for example, the evidence relied upon by the state was perhaps the most competent evidence on appellant's mental capacity at the time of the offense available, being so closely connected to the res gestae. It was neither unfair to introduce it[4] nor improper to comment upon it in summation; and, though considered in a somewhat different context (i.e., with respect to a defendant's right to silence during a psychiatric evaluation ordered by the court), we concur with the

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4 No issue is made herein about the postural sequence in which the evidence came in. That is, the evidence came in during the state's case in chief before there was any evidence from the appellant as to his insanity. But no objection was made at the time. So, by objecting to prosecutorial comments thereon during sumation, the appelalnt is in no different position than he would have been in had such evidence been introduced in rebuttal, when it would have been, as we hold here, proper.

observations of Mr. Justice Adkins in Parkin v. State:[5]

> "When the plea of not guilty by reason of insanity was entered, it was done so with knowledge of the existing statutes and case law on the subject. There is no constitutional right to plead this defense, and, if the statutes and case law permit a defendant the privilege of raising it, he must waive certain constitutional rights with respect to it, including the privilege against self-incrimination. . .

In view whereof, the judgment and sentence appealed from should be, and they are hereby, affirmed.

HOBSON, J., CONCURS.

GRIMES, J., DISSENTS WITH OPINION.

GRIMES, J.,dissenting.

There is considerable logic in Judge McNulty's opinion. Yet, it is an appreciable step beyond Harris v. New York in

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5 (Fla. 1970), 238 So.2d 817.

which the U.S. Supreme Court held that when a defendant took the stand he could be cross-examined on inconsistent statements he had given to the police in violation of his Miranda rights. That decision was based upon the premise that a person should not be entitled to commit perjury and at the same time hide behind the constitutional right to remain silent.

Here, there is no question of perjury because the appellant did not take the stand, and I canot equate interposing a defense of insanity with the giving of perjured testimony. The testimony of Officer Pilafant, had it been objected to, and the comments of the prosecutor in closing argument, which were objected to, would require reversal under Bennett v. State, supra. The fact that this evidence was probative on the sanity issue cannot

deprive appellant of his constitutional protections.

Moreover, had the state been conscious of the possibility that Pilafant's testimony might result in a violation of Miranda principles, the problem could have been avoided with a minimum of prejudice to the state's case. The questions and answers could have been couched in such a manner as to permit the officer to convey to the jury the fact that the appellant carried on a perfectly rational conversation without specifically stating that he chose to avail himself of his right to remain silent.

In view of the present posture of the law on this subject, I must respectfully dissent.

IN THE SUPREME COURT OF FLORIDA
TUESDAY, SEPTEMBER 12, 1978

DAVID WAYNE GREENFIELD,

Petitioner,

v. CASE NO. 50,565

STATE OF FLORIDA, DISTRICT COURT OF APPEAL, SECOND DISTRICT 75-1731

Respondent

ORDER

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal in Greenfield vs. State, 337 So.2d 1021 (Fla. 2 DCA 1976). Certiorari is granted and this case is remanded for further proceedings consistent with our recent decision in Clark v. State, Case No. 50,336 (opinion filed July 28, 1978).

ENGLAND, C.J., OVERTON, SUNDERBERG, HATCHETT and ALDERMAN, JJ., Concur
ADKINS and BOYD, JJ., Dissent

A True Copy cc: Hon. William A. Haddad, Clerk
TEST: Hon. R.H. Hackney, Jr., Clerk
by: [s] Hon. Roy E. Dean, Chief Judge
Chief Deputy Clerk

Sid J. White Hon. Jack O. Johnson
Clerk William I. Munsey, Jr. Esquire
Supreme Court Mr. David Wayne Greenfield

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

OCTOBER 1, 1979

DAVID WAYNE GREENFIELD,

Appellant,

v. CASE NO. 75-1731

STATE OF FLORIDA,

Appellee.

Pursuant to the order of the Florida Supreme Court remanding this case for further proceedings consistent with Clark v. State, 363 So.2d 331 (Fla. 1978), and it appearing that this court's decision in the above-styled case is consistent with Clark v. State, supra, upon consideration, it is

ORDERED that this court's prior affirmance herein is hereby adhered to.

A TRUE COPY
TEST:

[s] William A. Haddad

CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: Jack O. Johnson
Attorney General
Hon. R.H. Hackney, Jr.
David Greenfield
Hon. Sid J. White

EXCERPT FROM THE DIRECT EXAMINATION
OF OFFICER RUSSELL PILIFANT

[Officer Pilifant]

A. I had probable cause to believe the subject was the suspect of the alleged crime. I placed him under arrest.

[James Slater, Assistant State Attorney]

Q. After you placed him under arrest did he say anything to you?

A. No, sir. He--Except that I wanted him to get his face down into the sand, which he says "I don't need to." He put his hands behind his back, which I handcuffed.

Q. And after you handcuffed him what did he do?

A. I proceeded back to my cruiser which was parked at the north parking lot. At the time I got him back to the cruiser I proceeded to pat him down, since I could not do this on the beach for my own

safety. I patted him down, which I found an object which I thought resembled a knife in his left front pocket, but to my disclosure it wasn't in his jeans but in another what I believe was a jean-type material inside his jeans which later proved to be jean cut offs.

Q. All right. Did you find something in those jean cut-offs?

A. Yes, sir. I did. I found a knife.

Q. What did you do after you found the knife?

A. I put that in the front seat. I set him down in the back seat and I read him his Miranda warnings off my Miranda Card.

Q. Do you have that card with you today?

A. Yes, I do.

Q. Would you read us exactly what your read to Mr. Greenfield?

A. I explained to him this is the Miranda warning. "You have a right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights I have explained to you? Having these rights in mind do you wish to talk to us now?"

Q. When you asked him "did you understand these rights" what did he state?

A. He stated yes, he did.

Q. And when you asked him the question if he wanted to talk to you at this time what did he say?

A. No, he did not. He wished to talk to an attorney first.

Q. Is that the exact words he used?

A. Lawyer, sir.

Q. After he said he wanted to talk to a lawyer what did you do?

A. I proceeded to put him in the car in the back seat, shut the door. After I read him the Miranda warnings I called into the station I'd be en route to the station with the prisoner of this alleged crime. On the way in I explained to him again exactly the crime which did occur. I explained to him again that he also remembers to have the right to have an attorney before he makes any statements

or questions.

Q. What did he day to that?

A. "Thank you very much. I appreciate you explaining this to me."

Q. What occurred upon your arriving - or, did anything else, any other conversation, occur while you were going to the police station?

A. No, sir.

Q. Upon arrival at the police station what did you do?

A. Okay. I proceeded up to the booking officer, which time Detective Meredith and Detective Jolley --

Q. All right. Did he talk to you at any time at booking?

A. No, sir. We asked him at that time if--I--I'm not sure exactly who asked him the question. But he--I know he stated to me personally that he did not

wish to make any statements at the time, wanted to talk to a lawyer.

[SR 76 - 79]

EXCERPT FROM THE DIRECT EXAMINATION OF OFFICER JOLLEY

[James Slater]

Q. After you observed the defendant and what he was wearing and his description what did you proceed to do?

[Officer Jolley]

A. I asked Officer Pilafant if he had advised the defendant of his constitutional rights. He replied that he had. I then asked the defendant if he had been advised of his constitutional rights. He replied yes. I asked him at that time if he understood these constitutional rights. He replied yes. I asked him if he wished to give up the right to remain silent and talk to me about this case. He replied, "No, I want to talk to an attorney." At that time no further questions were asked.

Q. Did you proceed to booking at

that time?

A. Yes, sir. We proceeded at that time to take some physical evidence from the defendant during the booking process.

Q. All right. Did you ever take photographs of the defendant?

A. Yes, sir. Detective Meredith in my presence took photographs of the defendant.

Q. Detective Jolley, I ask you to look at state's exhibit marked for identification 12, 1 through 6 consecutively, and ask you to identify those, please.

A. Yes, sir. These are the photographs taken of the defendant in the booking room.

Q. Were you present when these photographs were taken?

A. Yes, sir. I was.

Q. And do the accurately portray

the pictures which were taken?

A. Yes, sir. They do.

MR. SLATER:

Your Honor, at this time I would move to introduce these six photographs as state's exhibit number 12.

THE COURT:

Mr. Stewart.

MR. STEWART:

Yes. At this time I would object on the basis that there is no connection between the photos and the scene of the crime.

THE COURT:

Objection is overruled. They may be received.

Q. (By Mr. Slater)

After obtaining what physical evidence you obtained what did you proceed to do?

A. We proceeded with the booking of the defendant. At this time we asked him if he desired attorney. We informed him that if he desired one or could not afford one one would be appointed for him free of charge at that time, and asked him that if he desired to speak with an attorney at that time. He replied yes. We telephoned the number for the public defender's office and a man answered, identified himself as an attorney, Larry Staub, and the phone was handed to the defendant.

Q. All right. After the conversation between the defendant and his attorney what occurred?

A. I then again asked the defendant if after having spoken to his attorney if he desired again to give up the right to

remain silent, and at this time talk to me about the case. He again replied No.

[SR 95 - 98]

CLOSING ARGUMENT OF JAMES E. SLATER,
ASSISTANT STATE ATTORNEY

MR. SLATER:

Good Afternoon. As the judge informed you, this is the closing argument, and as the judge also informed you this is not to be taken into consideration as far as the guilt or innocence of the parties--in other words, to be taken as facts to make the determination. It is argument. It is argument that will be used by myself and my Mr. Stewart. It may be used for persuasive value only, but not to be taken into consideration as to what the facts were.

If during my closing argument I should mis-state any of the facts regarding the testimony, please--that is my error. I apologize to you in the beginning about that. Remember it as you

recollect it, taking--taken from the stand. That is the sole way you should remember it for the determination in this case of sanity or insanity or guilt or innocence.

If I may begin by starting out and talking a little bit about the law in this case, because this--as we've had so far all the facts have been presented to you. What is upcoming is the law that Judge Dean will read you. I would like to go over very briefly with you what the law is in regards to sexual battery, which is a recently enacted statute in the State of Florida.

The defendant is charged in the crime of sexual battery likely to cause serious personal injury, and if I may read you the law in regards to that. It says it is the crime of sexual battery committed with

physical force likely to cause serious personal injury when a person commits a sexual battery upon a person over the age of eleven years old without the person's consent and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury.

Now, let me talk about what the definition of sexual battery is. Definition of sexual battery is any oral, anal, or vaginal penetration of another by any other object. However, sexual battery does not include acts for bona fide medical purposes. Then going down here, as I stated earlier, it says "Likely to cause serious personal injury." It defines serious personal injury and says--the definition of serious personal injury is great bodily harm or pain or permanent disability or permanent disfigurement.

The state contends and the state has shown beyond a reasonable doubt that the defendant, David Greenfield, by his actions, by his choking the victim into unconsciousness, has used actual physical force likely to cause personal injury. The statute was created just for this sort of situation where there has been injury and there has been force used that could cause injury without the use of a weapon. And what other more devastating physical force could be used than the choking of an individual around the throat? So therefore based upon all the facts and the evidence shown in this case and from the testimony of Tiana Parr and from the photographs that you will see in the--in the jury room and the testimony of Dr. Kamstock beyond a reasonable doubt that this individual did commit the crime of sexual

battery likely to cause serious personal injury.

But also along with that, if I may add, the judge will also advise you as to the lesser included offenses under this sexual battery laws, and that will include a sexual battery commited by threat or force. Let me read to you very briefly what that is. Is it is a crime of sexual battery by threat or force when a person commits a sexual battery upon a person over the age of eleven without the person's consent under the following circumstances: When the victim is physically helpless to resist--we don't have that situation; when the offender coerces the victim to submit by threatening to use force or violence likely to cause personal--serious personal injury on the victim, and the vicitm reasonably believes the

offender has the present ability to execute these threats. In other words, he coerces the individual into doing. Well, in this case we don't have that. He physically did place his hands and physically assaulted the victim. Third, when the offender coerces the victim to submit by threatening to retaliate against the victim or any other person and the victim reasonably believes that the offender has the ability to execute these threats in the future. We don't have that situation, either. He did not threaten to do it. He did do it. It will go again to define retaliation, physically helpless. But again we don't have that situation in this case at all, by the facts presented.

The next lesser included offense is a sexual battery committed with force not likely to cause serious personal injury,

and I read you very briefly that. Says it is a crime of sexual battery committed with force not likely to cause a serious personal injury of a person who commits a sexual battery upon another person over the age of eleven years without the person's consent and in the process thereof uses physical violence and force not likely to cause serious personal injury. Again by looking at all the facts presented in this case of course this case does not come under that situation bacause he did use force in this case, he used force likely to cause permanent or serious injury. So what we have here is the individual who has been charged and according to the facts presented he did commit sexual battery, to which he is charged, which is a sexual battery likely to cause serious personal injury.

Along with that there will be instructions as to assault with intent to commit sexual battery, attempted sexaul battery, neither of which we have because we don't have any attempts or assaults because we actually do have a sexual battery. A bare assault and assault. I felt advisable to state these. There is no indication that this individual commited any other act besides the act which he is charged with.

Now, further in the jury instructions there will be instructions in regards to insanity, and I feel I must go over this with you very briefly also. It'll state what insanity is, and when a person is considered insane, criminally insane. And the instructions will state this. Under the law a person is sane and responsible for his crime if he has sufficient mental capacity to understand what he is doing

to understand that his act is wrong. If at the time of the alleged crime a defendant was by reason of mental infirmity unable to understand the nature of his act or the consequences or was incapable of distinguishing that which is right from that which is wrong he was legally insane and should not be convicted.

Now, I think you should pay particular attention to this because as alleged by the defendant and as alleged by his psychiatrist they state at the time he committed this act he did not know the difference between right and wrong, nor the consequesces of his act. But let us look at the facts in regards to this case in the determination of guilt or innocence, because that is the only indication we can use as jurors to indicate guilt or innocence in this case as far as

sanity is concerned.

All right. Let's go, if we can go, to the testimony of the victim, the first one--Officer Lerer was just a property officer. Let's go to the crux of the matter. Tiana Parr. Tiana Parr took the stand and very difficultly went through the testimony regards to what happened to her that day. And I don't believe there's been any evidence to contradict the fact that this happened. There's been no evidence at all regards to that, so there's no question about the sexual battery occurred.

Of course, the total question in this case is sanity or insanity. And how do we judge sanity or insanity at the time an act is committed? Not a month and a half later, not two months later, but at the time it was committed. Well, of course

you cannot delve into a person's mind and read the way they're thinking. So how else do you determine a person's thinking at the time? Well, you determine it by his actions and by his words. And in this case I think both the actions and the words are totally indicative of an individual who did know what he was doing. And let's take those words, as I recollect them, from Tiana Parr.

The big thing defense attorney says and psychiatrists say at the time he committed the act he was insane because he made the statement "I don't know why I did it, yes, I know why I did it." But unfortunately we cannot take any comment out of context of the entire situation, and that's what I believe the evidence proved what the psychiatrist were doing. They would take that one little statement and

nothing else. But what they failed to realize is what else was going on at that time. He stated that and then after that he states "I'm sorry, I didn't mean to do it." Now, if a person didn't know he did something wrong why would he say "I'm sorry I did it"?

Go back to the definition of insanity. It says didn't know the difference between right and wrong and didn't know the consequenes of his act. Defense would have us believe that this guy didn't know he did something wrong, but from his own statements he says "I'm sorry," and when someone states they're sorry I think they state it because they know they have done something wrong to someone else. So that in itself indicates he knew his act was wrong.

But further on to that what else did he say? Well, the victim said "I won't tell anybody if you don't do anything to me, anything further to me." Because he first said he didn't know what to do with her after he committed the act. She says, "Well, I won't tell anybody." All right. So he says--he goes along with that. He believes that she is not going to tell anybody, go to the police. Logical. Yes. Did he know right from wrong? Yes, because of those statements. He also states, as you recollect, "What are you going to do about--what am I going to do --what are we going to do about your neck?", because of all the bad bruises around it. This is supposedly a person who at the same time didn't know he didn't do anything wrong, didn't know the consequences of his act. But yet he's worrying

about the marks on the neck. And also of course the statement that is so indicative of his frame of mind and his knowledge of what is occurring---he says "If I were a minor I wouldn't worry about it. But I'm not a minor." Here again, another statement which you'll notice neither of the defense psychiatrist would comment upon.

Another statement which indicates he knows what's going on-he knews if he was--knew if he was a minor he wouldn't have to worry about it, but since he is an adult he would. Again another indication of his mental state at the time he committed the act, that mental state being sanity, that mental state being knowledge of right from wrong and the consequences of his act. We cannot forget that in our determination of sanity or insanity in this case.

But let's go on from what she stated.

Let's go on to Officer Pilafant who took the stand, who the psychiatrists, both defense psyshiatrists, never even heard about, never even talked to. He states that he saw this fellow on the beach and that he went up to him, talked to him, and then arrested him for the offense. The fellow voluntarily put his arms behind his back and said he would go to the car. This is supposedly an insane person under the throws of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say "what's going on?" No. He says "I understand my rights. I do not want to speak to you. I want to speak to an attorney." Again an occasion of a person who knows what's going on around his surroundings, and knows

the consequences of his act. Even down --as going down the car as you recollect Officer Pilafant said he explained what Miranda rights meant and the guy said--and Mr. Greenfield said "I appreciate that, thanks a lot for telling me that." And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley--He's down there. He says, "Have you been read you Miranda rights?" "Yes, I have." "Do you want to talk?" "No." "Do you want to talk to an attorney?" "Yes." And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant--

MR. STEWART:

Your Honor, objection to that line of questioning.

THE COURT:

Can't hear.

MR. STEWART:

On final argument with regard to person's remaining silent. I think that's prejudicial error.

THE COURT:

May I see you at the bench?

(Off the record.)

THE COURT:

Objection is overruled. You may proceed.

MR. SLATER:

So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity. I apologize for saying guilt or innocence all the time. Insanity or insanity, because that is the sole issue before us today, not his guilt or innocence because

that has not been contested. So I believe before you should make any determination and even before you really think of what the doctors have said you must use your own judgment as a jury in determination of the sanity, because you alone are the judges of that. Not Dr. Piotrowski, Not Dr. Lose, Not even Dr. Gonzalez, because all they did was testify to what they felt. But you, the jury, are the sole persons who can determine whether or not this individual did know right from wrong at the time he committed this act.

And I contend, the state contends that there has been no evidence brought before this court which would instill in the jury's mind any indication that this individual did not know what he was doing at the time he committed the act, because of his own statements at the crime. He

indicated he knew it was wrong to do it, and that is all the jury has to determine.

I have two times to speak to you. Both this time and after in rebuttal--against Mr. Stewart. This is the way the courtroom procedure works. So I will save the rest of my argument until later on. Thank you.

[SR 329 - 341]

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Case No. 84-1480

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Petitioner,

v.

DAVID WAYNE GREENFIELD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER ON THE MERITS

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43pp

QUESTIONS PRESENTED

1. Whether a defendant's post-Miranda warning behavior, including silence, may be used as substantive evidence of his sanity at or near the time of the offense when that defendant elects to present an insanity defense, or whether such use of post-Miranda silence is violative of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

2. Whether the Court of Appeals decision in the instant case which reached this cause on the merits is in conflict with this Court's decision in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 249, 53 L.Ed.2d 594 (1977), where Respondent's claim was barred by his failure to comply with Florida's contemporaneous objection rule.

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Whether a defendant's post-Miranda warning behavior, including silence, may be used as substantive evidence of his sanity at or near the time of the offense when that defendant elects to present an insanity defense, or whether such use of postMiranda silence is violative of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

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QUESTION II 26

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PREFACE

The following references are made herein:

(JA) for the joint appendix, consisting of JA-1 - 100;

(R) for the record on appeal from the United States District Court to the Eleventh Circuit Court of Appeals;

(SR) for the state court record.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported as Greenfield v. Wainwright, 741 F.2d 329 (11th Cir. 1984) (rehearing denied January 28, 1985) and appears in the joint appendix at JA 4 - 37.

The opinion of the District Court of Appeal, Second District of Florida is reported as Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976) and appears in the joint appendix at JA 56 - 66. The memorandum opinion of the Florida Supreme Court remanding this cause to the District Court of Appeal is reported as Greenfield v. State, 364 So.2d 885 (Fla. 1978) and appears in the joint appendix at JA 67 - 68.

JURISDICTION

On September 6, 1984, the United States Court of Appeals for the Eleventh

Circuit reversed and remanded an Order of the United States Court for the Middle District of Florida denying a petition for writ of habeas corpus brought by a state prisoner pursuant to 28 U.S.C. §2254. A timely petition for rehearing was summarily denied on January 28, 1985.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a capital Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

> without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV of the Constitution of the United States provides inter alia, that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Title 28 U.S.C. §2254(a) provides that:

> The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only

> on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On June 26, 1975, the office of the State Attorney of the Twelfth Judicial Circuit, in and for Sarasota County, Florida filed a direct information against DAVID WAYNE GREENFIELD charging him with sexual battery committed with force likely to cause serious personal injury. Greenfield entered a plea of not guilty on July 11, 1975. This plea was changed to not guilty by reason of insanity on August 15, 1975. A Statement of Particulars in support of the insanity defense was filed October 9, 1975.

A trial by jury was held on two days, October 14, and 15, 1975. At trial, Greenfield pursued his insanity defense,

but did not concede that he had committed the offense charged. (SR 16, 17). At trial, the victim, Tiana Parr, testified that she reported the assault upon her immediately. (SR 41) Officer Russell Pilifant testified that he was at the police station when the victim reported the crime, and that he then went out to the beach where the crime occurred and came into contact with Greenfield. (SR 72 - 74) During direct examination, Officer Pilifant testified that he read Greenfield the Miranda rights (SR 77); and that Greenfield refused to talk with him before consulting an attorney. (SR 77 - 78) (JA 72 - 76) Officer Gordon Jolley offered similar testimony regarding Greenfield's decision to remain silent. (SR 96 - 98) (JA 77 - 79).

The defense registered no objection to this testimony. In closing arguments, the prosecutor made reference to the testimony of Officer Pilifant summarized in the following manner:

> "Let's go on to Officer Pilifant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow on the beach and that he went up to him, talked to him and then arrested him for the offense. The fellow voluntarily put his arms behind his back and said he would go to the car. This is supposedly an insane person under the throws of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say 'what's going on?' No. he says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down -- as going down the car as you recollect Officer Pilifant

said he explained what Miranda rights meant and the guy said - and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley - he's down there. He says, 'have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk.' 'No.' 'Do you want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant --" (SR 338 - 339) (JA 96 - 97)

Greenfield tendered an objection to this line of argument but Greenfield did not tender a Motion to Strike or a Motion for Mistrial. Similarly, Greenfield did not request curative instructions. (SR 339)

A verdict of guilty as charged was returned and, in an order filed November 21, 1975, Greenfield was adjudicated guilty and sentenced to life imprisonment.

Notice of Appeal was timely filed on November 21, 1975. By an opinion filed September 24, 1976, the District Court of Appeal, Second District, affirmed the judgment and sentence of the trial court. A petition for rehearing was filed on October 6, 1976, and denied October 25, 1976. Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976) (JA 56 - 66) At this point, a Petition for Writ of Certiorari was filed in the Florida Supreme Court.

By an order filed March 7, 1977, the Florida Supreme Court granted Greenfield's Petition for Writ of Certiorari and jurisdiction transferred to the Florida Supreme Court. That Court then remanded the case to the District Court of Appeal, Second District for proceedings consistent with its decision in Clark v. State, 363 So.2d 331 (Fla. 1978). (JA 67 - 68)

After such proceedings, the Second District Court of Appeal entered an order ruling that its initial opinion in Greenfield was consistent with Clark v. State, supra. and reaffirmed its original opinion. (JA 69 - 70)

Greenfield next sought federal habeas corpus relief claiming a violation of his Fifth Amendment rights by the prosecutor's reference to and use of Greenfield's post-arrest silence during trial and final argument. The federal district court denied relief (JA 47 - 55) and Greenfield appealed to the Eleventh Circuit. The Eleventh Circuit reversed, holding that post-arrest silence could not be utilized to rebut an insanity defense. (JA 4 - 37)

SUMMARY OF THE ARGUMENT

I.

When a defendant elects to present an insanity defense, the critical question is the criminal responsibility of the accused at the time he committed the offense, not whether the accused is, in fact, the perpetrator of the crimes charged. Sanity, or lack thereof, is a nebulous issue. The interests of justice are best served when the trier of fact has access to all evidence reasonably bearing on the demeanor of the accused at or near the time of the offense. Under these circumstances, the use of a defendant's post-Miranda[1] warning behavior, including silence does not violate Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

(1976). The Eleventh Circuit's holding to the contrary in the case at bar represents an unwarranted extension of Doyle.

The police officers at bar properly advised respondent of his rights under Miranda. Admission of testimony concerning respondent's behavior and argument thereon did not infringe on respondent's right to be free from self incrimination, but instead provided probative evidence on the issue which respondent elected to inject into the case - his sanity.

II.

It is undisputed that respondent never objected to the testimony of Officers Pilifant and Jolley. The Court of Appeals has held that this failure to object can be excused by Greenfield's subsequent objection to the prosecutor's closing argument flies in the face of

Florida's contemporaneous objection rule and clearly violates this Court's ruling in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

ARGUMENT

QUESTION I

Whether a defendant's post-Miranda warning behavior, including silence, may be used as substantive evidence of his sanity at or near the time of the offense when that defendant elects to present an insanity defense, or whether such use of post-Miranda silence is violative of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

In the case at bar, the Court of Appeals relied on this Court's opinion in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and held that the use of respondent's post-Miranda warning conduct, including his silence, as proof of sanity entitled him to a new trial.[2] In Doyle, this Court ruled

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[2] The Court of Appeals specifically held that the harmless error doctrine espoused in Chapman v. California, 368 US. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) did not apply because the prosecutor relied heavily on Greenfield's conduct as evidence of sanity. While petitioner does not necessarily agree with the Eleventh Circuit's conclusion in this regard, petitioner does not challenge that ruling here.

that a defendant's post-Miranda silence may not be used to impeach later exculpatory testimony given by the defendant. Id. Petitioner does not challenge the holding in Doyle, but submits that the Eleventh Circuit has improperly extended Doyle beyond the facts of that case.

Prior to trial, respondent entered pleas of not guilty and not guilty by reason of insanity. (SR 3, 4) At trial, the fact of respondent's commission of the offense charged was never seriously

contested.[3] The jury's attention was instead focused on whether respondent knew right from wrong at the time he sexually assaulted the victim. Officers Pilifant and Jolley testified without objection that at the time of his arrest, about two hours after the offense occurred (SR 47, 92), respondent appeared "normal" that is, he was calm, polite, able to follow instructions, and understand his rights when they were explained to him. (JA 71 - 81) Respondent, by the same token, was not ranting, raving, incoherent or obviously confused or unbalanced. This evidence, while not conclusive proof of sanity, was certainly relevant.

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3 In fact, defense counsel confined his closing argument to two factors, whether respondent had utilized force likely to cause serious personal injury and whether respondent was sane when he committed the offense. (SR 341 - 354)

Use of such evidence to prove sanity does not violate Miranda by compelling a defendant to incriminate himself or punish him for assertion of a constitutional right as proscribed by Doyle. Both the Seventh and the Tenth Circuits have held that Doyle is inapposite in the context of an insanity defense. Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. den., 460 U.S. 1043, 103 S.Ct. 1439, 75 L.Ed.2d 796 (1983); United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied, 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978). In Sulie, the Seventh Circuit approved the use of the defendant's post-Miranda request for an attorney to establish sanity, and held:

> Against the slight inhibiting effect on the constitutional right of silence of permitting testimony that a criminal defendant requested counsel at his

> interrogation, we must weigh the value to the state of being able to show that, when interrogated soon after the crime, the defendant who now claims he was insane when he committed the crime was sufficiently lucid to ask for a lawyer.
>
> Id. at 130

See also Jacks v. Ducksworth, 651 F.2d 480 (7th Cir. 1981); Kaufman v. United States, 350 F.2d 408 (8th Cir. 1965), cert. denied, 383 U.S. 951 (1966).

Last term, in New York v. Quarles, __ U.S. __, 104 S.Ct. __, 81 L.Ed.2d 550 (1984), this Court, in setting forth a limited public safety exception to the requirements of Miranda, permitted the use of a defendant's response to pre-Miranda custodial interrogation and evidence derived therefrom. The Court reasoned that it was incumbent on the officers involved to locate the weapon involved as quickly

as possible and refused to penalize the state for good police work by excluding the evidence at trial. Id. at 81 L.Ed.2d 557 - 558.

Likewise to preclude the evidence of the police officers at bar is to penalize the state for following proper procedures and promptly advising respondent of his rights. Had Miranda not been administered, the evidence regarding respondent's desire for an attorney and decision to remain silent would clearly be admissible. Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982). Had Miranda not been administered and had respondent chosen to make a statement, that statement would have been available to the state for impeachment purposes. Cf. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). If the Court of Appeals

decision in the instant case is allowed to stand, the trier of fact will, on retrial, be denied relevant evidence of respondent's mental state about the time of the offense because the police complied with their obligation to administer the Miranda warnings.

Petitioner submits that Miranda and by extension, Doyle, were never intended to apply where the question of the accused's commission of the crime charged was not in issue. The principle espoused in Harris v. New York, supra and United States v. Havens, 446 U.S. 620, 626, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980) applies with equal force to evidence which the state seeks to use generally to rebut an affirmative defense. Refusal to exclude such evidence leaves wholly intact the state's obligation to prove the defendant's guilt in its case-in-chief without

relying on unlawfully obtained evidence or violating a defendant's right to remain silent. Once, however, a defendant affirmatively presents evidence (or a defense), there is no rational basis upon which to deny the trier of fact probative reliable evidence on the issue of guilt, or, at bar, on the continuing viability of respondent's affirmative defense. There is even less justification to suppress evidence relevant to the defense of insanity. Insanity presupposes that the accused has "committed all the elements of a prescribed offense," United States v. Scott, 437 U.S. 82, 97 - 98, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978). Consequently, courts have recognized the similarity between using illegally obtained evidence for the narrow purpose of impeachment and using it only as bearing upon the insanity defense in that it was asserted to be evidence of

rationality contemporaneous to the crime. See Barkley v. United States, 323 F.2d 804, 806 (D.C. Cir. 1963). As observed in Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), there is a need when balancing the interests involved, (to) "weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce . . . " Id. at 417 U.S. 450.

Implicit in a careful scrutiny of Doyle and United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) is the fact that the right protected by these cases is a defendant's right to preclude the trial jury from inferring his guilt of a substantive offense based on evidence of post-Miranda silence. See also Anderson v. Charles, 447 U.S. 404,

100 S.Ct. 2180, 65 L.Ed.2d 222 (1980). This inference, of guilt by silence, does not logically or reasonably apply to the issue of mental competency.

Petitioner does not suggest that because respondent was sufficiently lucid at the time of his arrest to request an attorney conclusively establishes his sanity, but rather argues that it is one fact which, taken in connection with the rest of respondent's behavior contemporaneous to the offense, could properly be evaluated by the jury. At petitioner's trial one of the psychiatrists called by the defense, Dr. Lose, testified that respondent was schizophrenic. Dr. Lose testified that respondent's condition could be observed in his conversational style and specifically in his conflicting statements to the victim: I don't know why I did this/I know why I did this. (SR 132)

Surely it was useful and relevant for the jury to be able to evaluate the testimony concerning respondent's behavior in light of the psychiatric testimony adduced. The accuracy of the fact finding process was enhanced by the officers' testimony at the expense of no constitutionally protected right. Cf. Michigan v. Tucker, supra. Unlike the Court of Appeals at bar, this Court has not chosen to extend the holdings of Doyle and United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975). In Fletcher v. Weir, supra, this Court declined to hold that the use of post-arrest, preMiranda silence against a defendant was constitutionally impermissible. Nor is use of pre-arrest, pre-Miranda silence improper. Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).

In South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983), this Court held that the use of a defendant's refusal to take a blood-alcohol test against him at trial did not offend the right against self-incrimination. In short, the Eleventh Circuit's extension of the Doyle holding in the case at bar is not supported by the opinions of this Court.

This Court should hold that when, as in this case, the issue is not whether the defendant has committed each and every element of the offense charged, but the complex and elusive subject of his mental responsibility, the jury should be given such evidence bearing upon that defendant's cognition, volition and capacity.

QUESTION II

> Whether the Court of Appeals decision in the instant case which reached this cause on the merits is in conflict with this Court's decision in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 249, 53 L.Ed.2d 594 (1977), where Respondent's claim was barred by his failure to comply with Florida's contemporaneous objection rule.

It is beyond dispute that respondent never contemporaneously objected to the testimony of Officers Jolley and Pilifant regarding respondent's post-Miranda conduct. It is only when the prosecutor argued this evidence to the jury that defense counsel saw fit to object -- once. (SR 339) The Court of Appeals has stated, in its opinion in this cause:

> Under these circumstances the Petitioner's failure to object to the introduction of this evidence did not preclude his right to seek appellate review of the

> evidence's admissibility because he later made 20 objections to the prosecutor's attempt to argue the evidence to the jury. Greenfield v. Wainwright, 741 F.2d 329, 331 (11th Cir. 1984), footnote 1.

The record reflects that defense counsel made only one, not twenty, objections to the prosecutor's closing argument. (SR 339) That argument was nothing more than fair comment on the testimony of Officers Jolley and Pilifant which had come in without objection.[4] Petitioner must argue that the Eleventh Circuit was simply wrong in holding that the Wainwright v. Sykes[5] bar may be avoided by one or twenty subsequent, untimely objections.

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[4] Ordinarily, in closing argument, a Florida prosecutor may properly comment on all evidence adduced during the trial.

[5] Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 249, 53 L.Ed.2d 594 (1977).

It is clear, as a matter of Florida law that if a defendant, at the time an improper comment is made, does not move for mistrial, he cannot, after trial, in the event he is convicted, expect a reversal on appeal. A defendant will not be allowed to await the outcome of the trial with the expectation that if he is found guilty, his conviction will be automatically reversed. Clark v. State, 363 So.2d 331 (Fla. 1978).

The failure of a litigant to raise a claim at trial or on direct appeal in accordance with the procedural requirements imposed by the state will preclude consideration of that claim by the federal district courts in a habeas corpus proceeding brought pursuant to 28 U.S.C. §2254. Wainwright v. Sykes, supra; Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558,

71 L.Ed.2d 783 reh. denied, 73 L.Ed.2d 1296 (1982). This is true whether the default occurred at trial and/or appeal and extends to constitutional as well as non-constitutional claims. Engle v. Isaac, supra.[6]

Petitioner has consistently argued that the Second District Court of Appeal addressed the merits of respondent's claim only in the alternative, after first noting respondent's failure to object to the testimony of Officers Pilifant and Jolley. See Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976). On remand the district court reaffirmed its original opinion and held that it was consistent with Clark v.

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6 The Eleventh Circuit has recognized Florida's contemporaneous objection rule, although choosing to ignore it in this instance. See e.g. Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983).

State, supra. Since Clark expounds the contemporaneous objection rule under discussion it is not reasonable to assume that the Second District Court of Appeal would find its decision consistent with Clark unless it had, in fact, considered respondent's claim not properly preserved for appellate review.

Admittedly, the United States Magistrate, in his report and recommendation held that the Wainwright v. Sykes bar did not apply because the Florida courts reached the merits of the claim. (JA 53) The Wainwright v. Sykes bar was not argued before the Eleventh Circuit. That Court chose to treat the issue anyway, reaching its holding that an untimely objection is sufficient. Petitioner challenged this holding on rehearing. (JA 38 - 44) Thus, unlike the Sykes claim in Jenkins v.

Anderson, supra at 65 L.Ed.2d 92, this issue is properly before the Court.

Although Clark v. State, supra was not decided until after petitioner's trial, petitioner's counsel should have been aware that a timely objection was required and that the testimony in question was, at least arguably, objectionable. Cf. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970); Bennett v. State, 316 So.2d 41 (Fla. 1975). There has never been a finding of cause and prejudice for the failure to properly object, nor would such a finding have been appropriate. Engle v. Issac, supra.

Petitioner would urge this Court to reaffirm the continuing vitality of Wainwright v. Sykes and Engle v. Isaac by holding that respondent's failure to comply with Florida's contemporaneous

objection rule precludes federal habeas corpus review of respondent's claim that his silence was impermissably used against him.

CONCLUSION

Based on the foregoing arguments, Petitioner asks this Court to hold that a defendant's post-Miranda conduct, including silence, may be admitted at trial when sanity is in issue and when the behavior is sufficiently contemporaneous in time to the offense charged as to be relevant evidence of the defendant's mental state at the time of the offense.

Additionally, Petitioner asks this Court to hold that since the Florida courts enforced Florida's contemporaneous objection rule in this case, respondent's petition for habeas corpus was subject to dismissal under Wainwright v. Sykes, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ann Garrison Paschall, Counsel for Petitioner, and a member of the Bar of this Court, hereby certify that on the 21st day of June, 1985, I served three copies of the Petitioner's Brief on the Merits on James D. Whittemore, Esq., Counsel for Respondent, One Tampa City Center, Suite 2470, Tampa, Florida 33602, by depositing with the United States Postal Service a duly addressed envelope with postage prepaid. All parties required to be served have been served.

Ann Garrison Paschall
OF COUNSEL FOR PETITIONER

No. 84-1480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State of Florida,
Petitioner,

v.

DAVID WAYNE GREENFIELD,
Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED*

I. Whether the use of a defendant's post-arrest, post-Miranda silence, including his request for counsel, as substantive evidence of his sanity at or near the time of the offense is a violation of due process, when that defendant does not testify. *Doyle* v. *Ohio*, 426 U.S. 610 (1976).

II. Whether defense counsel's failure to object to the introduction of testimony concerning defendant's post-Miranda silence constitutes a procedural default barring review under *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), where defense counsel objected to the prosecutor's comment upon defendant's post-Miranda silence during summation and the state appellate court addressed the merits of the issue, or whether review by this Court should be denied because Petitioner failed to raise the *Wainwright* v. *Sykes* question in the Court of Appeals except in a Petition for Rehearing?

* Restated

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STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case, except as supplemented as follows:

When officer Pilifant approached Greenfield on Lido Beach, it was nearly two hours after the assault for which Greenfield was charged had occurred (TR-72-74). Petitioner's version of the facts would suggest a more immediate confrontation with Greenfield in relation to the time of the assault, a potentially significant difference in light of the issue as to the probative value of Greenfield's post-Miranda silence.

SUMMARY OF ARGUMENT

In *Doyle* v. *Ohio*, 426 U.S. 610 (1976) this Court proscribed the use of defendant's post-arrest, post-Miranda warning silence to impeach a defendant's explanation of an offense, as violative of the due process clause of the Fourteenth Amendment. Silence was deemed to be "insolubly ambiguous" and therefore non-probative, as silence in the wake of Miranda warnings may be nothing more than the arrestee's exercise of his Miranda rights. Secondly, because the Miranda warnings implicitly assure a defendant that his silence will carry no penalty, it would be "fundamentally unfair and a deprivation of due process" to allow the use of silence to impeach an explanation of the crime subsequently offered at trial. 426 U.S. at 618.

Where, as in the instant case, a Defendant does not testify during trial, there can be no constitutional or rational basis for not applying *Doyle*, even though the defense of insanity has been raised. Silence is particularly ambiguous when considered in the post-arrest, post-Miranda scenario. A suspect may not have heard or fully understood his rights or may simply have felt there was no need to reply. He may have maintained silence out of fear

or unwillingness to incriminate another. He may have reacted with silence in response to a hostile and unfamiliar atmosphere surrounding his arrest or detention. *United States* v. *Hale*, 422 U.S. 177 (1975).

The passage of time has not rendered silence any more meaningful than it was when *Hale* and *Doyle* were decided. That the mental state of a defendant is placed in issue during trial does not render his post-arrest, post-Miranda silence any less ambiguous. In this case, in particular, silence and a purported exercise of constitutional rights was entirely consistent with Greenfield's diagnosis of paranoid schizophrenic. Particularly, where, as here, Greenfield's silence and exercise of his rights came nearly two hours after the offense, Greenfield's ability to understand and exercise his rights at the time of arrest is entirely consistent with being insane at the time of the offense, as the classic paranoid schizophrenic experiences intervals of lucidity and rationality and irregular shifts between lucid and confused moments.

Traditionally, from an evidentiary standpoint, silence has been admissible only under circumstances which would naturally call for a denial of an assertion of fact. 4 Wigmore, Evidence § 1071. A fortiori, if the circumstances do not naturally call for denial, the failure to deny lacks probative value and should not be admissible. Mere silence of a party, under circumstances which would not naturally call for a statement or response, creates no evidence, one way or the other. Traditionally, therefore, the probativeness of silence is conditioned upon the capability of the party remaining silent to understand the meaning of the statements or assertions made to him, his having sufficient knowledge of the facts to reply and a statement made under circumstances which would naturally call for a reply to a person normally entitled to a

reply. Here, Greenfield had no obligation to reply to a police officer who, after having just arrested him, advises him that he has the right to remain silent. Because of the remoteness in time of his arrest to the offense, and the consistency between silence and his diagnosed condition, Greenfield's silence at the time of his arrest had no tendency to make his sanity at the time of the offense more probable or less probable than it would be without evidence of silence.

The assurances of Miranda are significant to all criminal defendants, regardless of the nature of the defense raised, absent perjury or legitimate impeachment when a defendant testifies. *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). Nothing embodied in the Miranda warnings warn a defendant that his silence may be used in those cases where his sanity is placed at issue. Under these circumstances, the use of Greenfield's silence by the prosecutor placed a price on Greenfield's exercise of his Fifth Amendment rights and contradicted the implicit assurances of his Miranda warnings. Because that silence may have been induced by those implicit assurances, it was fundamentally unfair and a violation of Greenfield's due process rights for his silence to be used against him.

It is unnecessary, in the ordinary case, for a prosecutor to use silence to suggest that a defendant was sane when confronted by police at or near the time of the offense. The prosecutor is always able, and was able in this case and in fact did so, to elicit testimony as to a defendant's demeanor and behavior. Necessity, therefore, cannot justify the use of one's silence and the exercise of a constitutional right, given the assurance contained in the Miranda warnings. Because Greenfield did not testify, there is no need to "ferret out perjury" or to cross-examine and impeach a prior inconsistent statement.

If there is to be any meaning in the Miranda warnings and the Fifth Amendment privilege to a defendant confronted by a police officer, the use of silence in the wake of these warnings must be prohibited, regardless of the defense asserted. There can be no rational distinction between "guilt" and "sanity" for purposes of applying Miranda and *Doyle*. Mental intent in an essential element of a criminal offense in Florida which must be proved beyond a reasonable doubt, together with the other essential elements of the offense. Post-Miranda silence, in the absence of inconsistent testimony by the defendant, cannot be used as substantive evidence of guilt, whether offered against an essential element of an offense or to rebut the affirmative defense of insanity. The insanity defense cannot, any more than other defense, be prejudiced by the admission of unconstitutional evidence. See: e.g. *Kaufman* v. *United States*, 394 U.S. 217, 230 (1969). A defendant who raises an insanity defense should not be any less entitled to the protection of due process simply because the crux of his case revolves around his mental state. Use of post-Miranda silence is no less egregious than in other case and carries no less a penalty.

II.

For the first time since the United States Magistrate addressed the issue, with the exception of a Motion for Rehearing filed with the Eleventh Circuit Court of Appeals, Petitioner contends that consideration of this constitutional issue is barred by *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). This was not assigned as error in the court below nor did the court below consider *Wainwright* v. *Sykes*, other than parenthetically in a footnote in the decision (JA 10). Having failed to assign the issue as error in the court below, Petitioner should not now be heard to complain. Considerations of judicial efficiency demand

that a *Sykes* claim be presented before a case reaches the Supreme Court. *Jenkins* v. *Anderson*, 447 U.S. 231, 234, n.1.

Alternatively, review is not barred by *Wainwright* v. *Sykes*, as the issue was raised before and addressed by the Florida Second District Court of Appeal when Greenfield appealed from his conviction. Furthermore, Greenfield's counsel preserved the issue for appeal (and subsequent federal review), by objecting during the prosecutor's summation when actual use was made of Greenfield's silence. Since those remarks during summation were in themselves violative of *Doyle* and were directed to the same testimony which came in without objection, it cannot be said that there has been a waiver under *Sykes*, since the related objection sufficiently raised the constitutional issue. *Thomas* v. *Estelle*, 582 F.2d 939 (5th Cir. 1978).

Independent of the Magistrate's specific findings which were not appealed, there existed "cause" for counsel's failure to object and "prejudice" which warrants federal review. Counsel's failure to object was a result of neglect and inattentiveness, rising to the level of ineffectiveness, and is not attributable to an intentional decision by counsel made in pursuit of his client's interests. *Reed* v. *Ross*, ___ U.S. ___, 104 S.Ct. 2908 (1984). Counsel's neglect and inattentiveness allowed a prosecutor to not only bring forth evidence of post-Miranda silence but to actually use it during argument. This underminded the only defense available to Greenfield. In this close case, in which the jury ultimately had to resolve conflicting expert testimony, it cannot be said that the prosecutor's use of Greenfield's silence did not prejudice the defense.

ARGUMENT

The use of Greenfield's silence during his trial fell clearly within the proscription against the use of

post-*Miranda*[1] silence announced by this Court in *Doyle* v. *Ohio*, 426 U.S. 610 (1976). Contrary to the urging of Petitioner, the Eleventh Circuit's opinion correctly followed and applied the rule set forth in *Doyle*.

In *Doyle*, this Court held that a prosecutor's use of a defendant's post-arrest, post-Miranda warning silence, to impeach the defendant's alibi defense, violated the due process clause of the Fourteenth Amendment. Two reasons for proscribing the use of a defendant's post-arrest, post-Miranda silence were given. First, such silence was deemed to be "insolubly ambiguous." 426 U.S. at 617. The ambiguity was said to exist because the Miranda warnings advise a defendant that he has the right to remain silent, that anything he says may be used against him and that he has the right to consult with counsel before submitting to interrogation and that silence in the wake of these warnings may be nothing more than the arrestee's exercise of his Miranda rights. Secondly, while Miranda warnings do not contain an express assurance that silence will carry no penalty, there is an implicit assurance in the warnings that one's silence will carry no penalty. In light of this implicit assurance, this Court determined it would be "fundamentally unfair and a deprivation of due process" to allow the arrested person's silence to be used to impeach an explanation of the crime subsequently offered at trial. 426 U.S. at 618.

Petitioner claims that he "does not challenge the holding in *Doyle*," but contends that the Eleventh Circuit has "improperly extended *Doyle* beyond the facts of that case." (Petitioner's br. at p. 15). *Doyle*, however, was not limited to its own facts. Referring to the Miranda warnings as a "prophylactic means of safeguarding Fifth Amendment rights," this Court observed generally that:

> "Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, *every* post-arrest silence is insolubly ambiguous because of what the state is required to advise the person arrested." 426 U.S. 617 (emphasis added).

Furthermore, this Court observed that the assurance in the Miranda warnings that silence would carry no penalty was "implicit to *any* person who receives a warning" and that "in such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial" (emphasis added). 426 U.S. 618. Not only does this Court's opinion in *Doyle* apply its holding generally to all arrested defendants, it does not distinguish between defenses in its treatment of the "dubious probative value" of silence and the unfair use of silence in the face of the Miranda assurance.

The rationale of the rule prohibiting the use of or comment upon a defendant's silence finds origin in earlier cases decided by this Court.[2] A reading of *Doyle*, *Hale* and *Griffin* identifies three now historical reasons for

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[1] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[2] *Griffin* v. *California*, 380 U.S. 609 (1965), holding that it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when under police custodial interrogation and therefore the prosecution may not use at trial the fact that he stood mute or claimed his privilege in the face of accusation. See also: *United States* v. *Hale*, 422 U.S. 171 (1975), holding that an accused's silence during police interrogation lacks significant probative value, observing that in most circumstances, silence is so ambiguous that it is of little probative force. 422 U.S. at 176.

prohibiting the use of and comment upon a defendant's post-arrest silence. First, it is insolubly ambiguous and therefore lacks probative value. Secondly, in light of the implicit assurance contained in the Miranda warnings, use of silence in the wake of these warnings imposes a penalty upon a defendant for the exercise of his constitutional rights. Finally, it is fundamentally unfair and a deprivation of due process to allow the use of one's silence in view of the implicit assurances in the Miranda warnings and the accused's right to rely on that assurance.

Admittedly, *Doyle* addressed the use, for impeachment purposes, of one's post-Miranda silence when the defendant testifies at his trial and offers an exculpatory version of the facts. In this respect, *Doyle* differs from the instant case in that Greenfield did not take the stand and therefore the prosecutor's use of and comment upon his post-arrest silence cannot be construed as an attempt to impeach testimony. To this extent, of course, the facts in the *Doyle* case are distinguishable from those in the instant case. Yet, application of *Doyle* to the instant facts does not, at least on this basis alone, constitute an "unwarranted extension" of *Doyle*, for even the dissenters in *Doyle* agreed that evidence of post-arrest silence is inadmissible to show guilt. 426 U.S. 610, 634-635.

Petitioner argues that post-arrest silence, notwithstanding *Miranda* and *Doyle*, should be admissible to "prove sanity" (Petitioner's br. at p. 17). In making this argument, Petitioner promotes exactly what has been uniformly proscribed, even by the dissenters in *Doyle*, the use of silence to show guilt. Petitioner's contention that Greenfield never "seriously contested" the commission of the offense is but an attempt to draw an artificial distinction between the issues of guilt and sanity which ignores the prosecution's fundamental burden of proof.

The fact remains that Greenfield's defense counsel never conceded that his client had committed the acts, contested certain elements of the offense and the jury was instructed on the state's burden of proof apart from its burden with respect to the insanity defense. Furthermore, Florida law does not bifurcate its criminal trials into separate guilt and sanity phases. *State Ex Rel. Boyd* v. *Green*, 355 So.2d 789 (Fla. 1978), (declaring that Florida's (former) insanity statute which bifurcated the trial unconstitutional, reasoning that the intent of the accused is an essential element of the offense and a bifurcated trial improperly presumes the requisite intent, contrary to the state's burden of proving each and every element of the offense beyond a reasonable doubt).

Petitioner complains that *Miranda* and *Doyle* "were never intended to apply where the question of the accused's commission of the crime charged was not an issue." He suggests that once a defendant raises an affirmative defense, he has in essence admitted his "guilt" with respect to the physical acts.[3] (Petitioner's br. at p. 21, 22) The fallacy of Petitioner's argument is that while on the one hand he recognizes that silence cannot be used to prove guilt, on the other, he suggests that it should be allowed as evidence probative to an essential element of the offense which must be proven by the prosecution to establish guilt.

The issue before the Court is not, as Petitioner urges, whether the Eleventh Circuit engaged in an "unwar-

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[3] In Florida, the defendant has the burden of introducing significant evidence to raise a reasonable doubt as to sanity. The burden then shifts back to the state, and "it devolves upon the state to show the sanity of the accused, as well as any other element of the crime." *Armstrong* v. *State*, 9 So. 1 (1891).

ranted extension" of *Doyle*.[4] Actually, the issue is whether this Court can rationally and constitutionally carve out an exception to *Doyle* which would allow the use of silence to prove guilt when sanity is at issue.

At page 19 of Petitioner's brief, he asserts:

> "Had *Miranda* not been administered, the evidence regarding Respondent's desire for an attorney and his decision to remain silent would clearly be admissible. Citing *Fletcher* v. *Weir* 455 U.S. 603 (1982).

This is an incorrect reading of *Fletcher* v. *Weir*. In *Fletcher*, the defendant *testified* and was impeached by his post-arrest, *pre*-Miranda silence. This Court, finding no constitutional violation, held:

> "In the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for the state to permit cross-examination as to post-arrest silence *when a defendant chooses to take the stand.*" 455 U.S. at 607. (emphasis added)

Greenfield did not take the stand in his defense and his silence came only after he had been given his Miranda warnings containing the affirmative assurances which were conspicuously absent in *Fletcher* v. *Weir*.

Conspicuously absent from Petitioner's brief is a treatment of the constitutional basis recited by this Court in *Doyle* and in each opinion of this Court since, for the rule proscribing the use of silence. Rather than address this fundamental issue, Petitioner complains that precluding

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[4] In his brief on the merits, Petitioner accuses the Eleventh Circuit of having "improperly extended *Doyle* beyond the facts of that case" (Petitioner's br. at p. 15). Petitioner refers to the Eleventh Circuit's holding as an "unwarranted extension of *Doyle*." (Petitioner's br. at p. 12).

the use of silence will "penalize the state for following proper procedures and promptly advising respondent of his rights" (Petitioner's br. at p. 19). The irony of Petitioner's argument is that the constitutional issue in all likelihood would never have arisen had the prosecutor not elicited testimony that Greenfield had remained silent and requested to speak to an attorney after being warned of his rights.

To suggest that the "police officers at bar" have been penalized by the preclusion of the use of Greenfield's post-Miranda silence is absurd. The police officers merely responded to questions asked of them by a prosecutor who could have and should have restricted his examination. Petitioner's reference to *New York* v. *Quarles*, ___ U.S. ___, 104 S.Ct. 2626, (1984) to the extent it is reliance, is misplaced. The "public safety exception" to Miranda has nothing whatsoever to do with a comment upon and use of a defendant's post-Miranda silence and invocation of constitutional rights.

The Mystery Of Post-Arrest, Post-Miranda Silence, Revisited

The passage of time has not rendered silence any more meaningful than it was when *Hale* and *Doyle* were decided. Silence is particularly ambiguous when considered in the post-arrest, post-Miranda scenario.

> "At the time of arrest and during custodial interrogation, innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision in these often emotional and confusing circumstances. A suspect may not have heard or fully understood the question or may have felt there was no need to reply. (Citation omitted) He may have maintained silence out of fear or unwillingness to incriminate another. Or the

> arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention." *United States* v. *Hale*, 422 U.S. at 177.

Silence today is still "insolubly ambiguous," regardless of the defense which a defendant presents during the course of his trial. As observed by the Supreme Court of Florida:

> "In sum, just what induces post-arrest, post-Miranda silence remains as much a mystery today as it did at the time of the *Hale* decision. Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt." *State of Florida* v. *Burwick*, 442 So.2d 944, 948 (Fla. 1983), cert. denied ___ U.S. ___, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984) in which the Florida Supreme Court specifically disapproved of the decision of the Florida Second District Court of Appeal in *Greenfield* v. *State*, 337 So.2d 1021 (Fla. 2nd DCA 1976).

The Eleventh Circuit's opinion reflects a considered evaluation of the trial testimony of the two psychiatrists who considered Greenfield to be paranoid schizophrenic.[5]

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[5] Dr. Loce, a psychiatrist appointed by the court to examine Greenfield, determined that he was unable to tell right from wrong or to know the consequences of his acts and classified him as schizophrenia paranoid type (SR 126). According to Dr. Loce, Greenfield exhibited classic symptoms of a paranoid schizophrenic, in that he was "quite suspicous . . . feeling that people were trying to cause him difficulty," for example. A typical paranoid schizophrenic would not, if approached by police, flee as "he would not realize that he had done anything that was wrong or that he had any trouble coming or any consequences. Policemen wouldn't bother him because it wouldn't click." (SR 143). Greenfield exhibited a tendency to withdraw from reality, "that he didn't like being around people." (SR 154).

Dr. Piotrowski, a psychiatrist, examined Greenfield pursuant to court order and diagnosed him as paranoid schizophrenic and antisocial personality (SR 221).

Dr. Gonzalez, a psychiatrist testifying for the state, determined that Greenfield knew the difference between right and wrong and found no evidence of disorder (SR 284, 285). In describing the four cardinal symptoms of schizophrenia, known as the "four a's of Bluler," Gonzalez explained that autism is typified by withdrawal (SR 288).

Observing that the psychiatric testimony suggested that such a person is often quiet, the Court appropriately determined that the probative value of one's post-arrest, post-Miranda warning silence in determining his sanity "will vary markedly with the disease he has, the symptoms he tends to exhibit and the closeness in time between the arrest and warning and the crime" (JA 22). Observing that silence, under these circumstances, might only reflect one's paranoia that the authorities were persecuting him even though he was innocent, and that silence would be consistent with the mental disease of paranoid schizophrenia, the Court appropriately determined that such evidence was not probative of Greenfield's sanity (JA 24).

At page 16 in his brief, Petitioner concludes, without any supporting authority or empirical foundation, that Greenfield's demeanor "about two hours after the offense occurred" "was certainly relevant." This conclusion begs the question. What exactly was it "certainly relevant" to?

Relevance and probative value cannot be so easily presumed. In the context of this case, in which Petitioner's insanity defense rested on his diagnosis of paranoid schizophrenic, whether he was "ranting, raving, incoherent or obviously confused or unbalanced" would not have had and does not now have any bearing on whether Greenfield's particular condition rendered him insane under Florida law. The question of relevance and

probative value cannot be couched in terms of normality versus incoherency. Petitioner's approach in this regard is not only naive but fails to truely address the issue he frames. Obviously, there is a distinction between purely "demeanor" evidence which may or may not be relevant, depending on the nature of the mental condition advanced by a defendant, and that same defendant's silence and invocation of constitutional rights in the wake of Miranda warnings.

Petitioner does not even mention silence in his discussion of so called "demeanor" or "behavior" evidence. It is not Greenfield's position nor has it ever been that a prosecutor should be precluded from presenting purely demeanor or behavior evidence or what has been referred to a "observed physical characteristics"[6] in an effort to impeach an insanity defense.

It has been said that relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly proveable in the case.[7] In other words, "does the item of evidence tend to prove the matter sought to be proved?" Advisory Committee's Note to Rule 401, Fed.R.Evid. Obviously, all relevant evidence is not admissible, as there may be procedural exclusionary rules or constitutional prohibitions which prevent the use of evidence, even though relevant.[8]

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[6] *Kaufman* v. *United States*, 350 F.2d 408, 416 (8th Cir. 1965) cert. denied 383 U.S. 951 (1966).

[7] Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, Federal Rules of Evidence; Florida Statute 90.402 (1983).

[8] The Constitution will impose basic limitations upon the admissibility of relevant evidence, such as evidence obtained from unlawful search and seizure, *Weeks* v. *United States*, 232 U.S. 383 (1914); *Katz* v. *United States*, 389 U.S. 347, (1967) or incriminating statements elicited from an accused in violation of right to counsel, *Massiah* v. *United States*, 377 U.S. 201 (1964).

Traditionally, a failure to speak will constitute an admissible admission only when the silent party would have, under the circumstances, naturally been expected to deny an assertion of fact. 4 Wigmore, Evidence § 1071. A fortiori, if the circumstances do not naturally call for denial, the failure to deny lacks probative value and should not be admissible. *McCormick et al. on Evidence 2d Ed. § 161.* As Wigmore notes:

> "Silence *may* imply assent to the correctness of a communication, but on certain conditions only. The general principle of relevancy . . . tells us that the inference of assent may safely be made only when no other explanation is equally consistent with silence; and there is always another possible explanation—namely, ignorance, or dissent . . ." Wigmore, Evidence § 1071.

Stated another way, the mere silence of a party creates no evidence, one way or the other. *Vail* v. *Strong*, 10 Vt. 457, 463 (1838). Clearly, something of an uncertainty attends the interpretation of a person's silence, even as an implied admission of a statement made by someone else. Accordingly, it is generally recognized that silence is not admissible unless certain specific conditions exist, among which are that the party is capable of understanding the meaning of the statement or assertion made to him, he had sufficient knowledge of the facts embraced in the statement to reply thereto, the statement was made under such circumstances as would naturally call for a

reply and the statement was made by a person normally entitled to a reply.[9]

In this case, Greenfield's capability of understanding his Miranda rights is the very focus of whether his post-Miranda silence is probative. To assume that Greenfield was capable of understanding (and exercising) his Miranda rights would be a dangerous assumption, indeed, given the expert psychiatric testimony presented during the course of the trial. Whether and to what extent Greenfield had sufficient knowledge of the facts embraced in Officer Pilifant's explanation of Greenfield's arrest and the significance of Greenfield's Miranda rights is again, central to the issue surrounding the probative value of his post-arrest silence. Clearly, Greenfield was under no legal obligation to reply to Officer Pilifant's statements and as an individual's Fifth Amendment rights against self-incrimination are generally a matter of common knowledge among the citizens of this country, it can hardly be said that Greenfield, when confronted by a police officer who arrests him, "would naturally" reply. Lastly, Officer Pilifant is not a person who would normally be entitled to a reply, having just arrested Greenfield and advised him of his right *not* to make any statements.

The conditions precedent to the traditional admissibility of silence in the face of an assertion of fact are simply not present in the real world of police-suspect confrontation. The very essence of the Fifth Amendment protection embodied in the Miranda warnings eliminates two key conditions, that the silent party, when confronted, would naturally respond and that the statement met with silence was made by a person normally entitled to a reply. As one court has observed, after discussing the

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[9] See generally: 4 Wigmore, Evidence § 1071, § 1072 et seq.

traditional admissibility of silence in the wake of an assertion of fact which would naturally call for a reply:

> "If, as *Hale* and *Doyle* hold, a defendant's silence cannot be treated as a prior inconsistent statement for impeachment purposes, a fortiori it cannot be used substantively as an admission tending to prove the commission of the offense." *Boyer* v. *Patton*, 579 F.2d 284, 288 (3rd Cir. 1978) (where the defense of insanity was also raised by the defendant).

Petitioner argues that silence, to the extent that it shows lucidity at the time of Greenfield's arrest, is a fact which "could properly be evaluated by the jury" and would have been "useful and relevant for the jury to be able to evaluate the testimony concerning Respondent's behavior in light of the psychiatric testimony adduced" (Petitioner's br. at p. 23, 24). Petitioner's argument that evidence of a defendant's silence is "probative, reliable evidence on the issue of guilt" and "relevant to the defense of insanity" finds little support in the opinions of this Court. Whether silence has a tendency to make the existence of the fact to be proved (sanity) more probable or less probable simply does not turn on whether or not evidence of silence would be useful to the jury. Any assumptions of probativeness, which apparently underlie the reasoning of the small number of cases on which Petitioner relies, are not compatible with psychiatric realities. The psychiatric realities, gleened from even a cursory review of textbook psychiatry and the testimony offered during Greenfield's trial, underscore the naivete of Petitioner's theory that Greenfield's ability to understand and exercise his constitutional rights was probative and relevant. As agreed by all three trial psychiatrists, one of the four cardinal symptoms of paranoid schizophrenia is ambivalence. Dr. Loce characterized schizophrenia by its ability to "wax and wane in severity," stating that at times

it can be "quite latent or—so that it can't be seen, other times quite florid" (SR-202). In other words, the symptoms of the disorder "come and go" (SR-203). Intervals of lucidity and rationality, no less than litigousness and guardedness, are consistent with and typical of psychosis. Indeed, irregular shifts between lucid and confused moments are a clinical feature of schizophrenia:

> "Another strange but specific characteristic of schizophrenia is its unpredictability, variability or inconsistency. A schizophrenic patient may be incapable at a certain time of carrying on a rational, simple conversation and yet an hour later he may write a sensible and remarkably well composed letter to a relative. He may refuse to change his shirt for weeks and offend those around him by his strange behavior, but he may, on the same day, display perfect manners when attending a birthday party. He may be unable to figure the right change for a dollar purchase, yet he may be able to play a sophisticated game of bridge or chest." A. Freedman, H. Kaplan, *Comprehensive Textbook of Psychiatry,* p. 622-623 (1967).

According to the authorities, paranoid forms of psychosis also frequently manifest themselves in the very caution and preoccupation with real or perceived rights which Petitioner would attribute to sanity.

> "A typical paranoid patient is suspicious, guarded and reserved. Often he is hostile and aggressive. A. Freeman, H. Kaplan, *Comprehensive Textbook of Psychiatry,* at p. 633-634 (1967).

> "The patient with paranoia often talks much about his "rights" and wants justice done to him. He may instigate lawsuits alleging stolen property, embezzeled money, defrauded patent rights, defamation of character and financial conspiracies against him. The patient's paranoid system may have an obsessive

> quality that causes him to talk about it endlessly to his family and his acquaintances. In other instances the patient talks about it only when he finds a receptive listener or someone whom he feels can help him in resolving his grievances." A. Chapman, *Textbook of Clinical Psychiatry,* at p. 264 (1967).

The ambivalent nature of a schizophrenic individual's personality and behavior underscores the ambiguity of Greenfield's silence. According to the testimony of the trial psychiatrists, upon confronting a schizophrenic individual, one might encounter aggressive, paranoid behavior and at another time, encounter within the same person a reserved, withdrawn spirit. According to Freedman and Kaplan, "the paranoid individual's intelligence and capacity for appropriate social interaction may remain quite sophisticated in areas not invaded by his delusion. *Comprehensive Textbook of Psychiatry,* at p. 622-623 (1967).

All of this renders it unlikely that Greenfield's silence and request for an attorney tended to make the existence of his sanity more probable or less probable then it would be without the evidence. In the words of the Eleventh Circuit:

> "The level of lucidity under which an insane person operates may vary with time. Symptoms of insanity also vary widely, with the specific disease and with time, ranging from complete withdrawal (which is often marked by silence) to violent rages. A person's apparent level of comprehension may not always correspond to his level of sanity at the time. Accordingly, the probative value of a person's post-arrest, post-Miranda warning silence in determining his sanity at the time of the crime will vary markedly with the disease he has, the symptoms he tends to exhibit and the closeness in time between the arrest and warning and the crime . . ." . For Petitioner to have consis-

tently asked for a lawyer and refused to speak with police, then, might only reflect his paranoia that the authorities were persecuting him even though he was innocent . . . in this case, the evidence was probative only of Petitioner's ablity to understand English and to remain calm, which would be consistent with the mental disease of paranoid schizophrenia. The evidence accordingly was not probative of Petitioner's sanity." (JA-24).

The Necessity Of It All—Is There Not Another Way?

In this case, just as in *Doyle*, Petitioner pleads necessity as justification for the prosecutor's use of Greenfield's post-arrest, post-Miranda silence (Petitioner's br. at p. 20). However, it simply is not necessary, in a typical case, to use silence and an invocation of a constitutional right to establish sanity.[10] In this case, the prosecutor was able to artfully draw out facts, including Greenfield's conduct, which he used to support his argument that Greenfield exhibited signs of sanity. It was unnecessary for the prosecutor to delve into Greenfield's silence in response to the Miranda warnings and his exercise of constitutional rights. In short, the prosecutor could have elicited exhaustive testimony from all witnesses who had contact with Greenfield as to his demeanor and behavior without

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[10] For example, in the instant case, Officer Pilifant testified that he confronted Greenfield, asked for and obtained identification, verified his name and advised him of his investigation. Greenfield did not hesitate when asked for the identification and did not indicate that he didn't understand (SR-74) Pilifant questioned Greenfield and had him roll up his pants legs. Greenfield did what he was asked to do without hesitation (SR-75). Greenfield put his hands behind his back to be handcuffed as requested. He didn't make any statements which didn't make sense or were "gibberish" (SR-83). He did not become violent and never appeared "not to comprehend what was going on" (SR-84).

using Greenfield's silence. Necessity cannot justify the use of one's silence and the exercise of one's constitutional rights, given the assurances contained in the Miranda warnings. These assurances are significant to *all* criminal defendants, regardless of the nature of the defense raised, absent perjury or legitimate impeachment when a defendant testifies. e.g., *Harris* v. *New York*, 401 U.S. 222 (1971); *Jenkins* v. *Anderson*, 447 U.S. 231 (1980); *Fletcher* v. *Weir*, 455 U.S. 603 (1982).

When He Doesn't Say He Did, There's No Need To Prove He Didn't.

As recognized in *Doyle*, post-arrest silence can be used by the prosecution to impeach and contradict a defendant who testifies to an exculpatory version of facts and claims to have told the police the same version upon arrest. 426 U.S. at 619, n.11. The decisions of this Court following *Doyle* which have allowed use of post-arrest silence have uniformly justified its use because of the need for cross-examination and impeachment of a defendant who testifies in a manner inconsistent with his prior actions or prior statements and whose credibility becomes an issue. The obvious purpose is to ferret out perjury by utilizing traditional truth-testing devices of the adversary process. *Harris* v. *New York*, 401 U.S. at 223; *Jenkins* v. *Anderson*, supra; *Fletcher* v. *Weir*, supra.

Unlike *Jenkins*, *Harris* and *Fletcher*, Greenfield did not testify during his trial and therefore his credibility is not at issue and he was not subject to impeachment. There was no need, for example, to ferret out perjury. Had Greenfield taken the stand and denied that he exercised his constitutional rights or that he understood the officer's advisements, then under the rationale of *Jenkins* and *Harris*, Greenfield would have been properly subject

to cross-examination and impeachment by his prior inconsistent silence.

Furthermore, Greenfield's silence occurred *after* he had been arrested and advised of his Miranda rights. A careful review of these post-*Doyle* cases reflects that this Court has never shown a tendency to allow use of post-Miranda silence against a non-testifying defendant under any circumstances. To be sure, in *Fletcher* v. *Weir*, the case turned on the *absence* of the affirmative assurances embodied in the Miranda warnings, with this Court observing "the significant difference between the present case and *Doyle* . . . that the record does not indicate that respondent Weir received any Miranda warnings during the period in which he remained silent immediately after his arrest." 455 U.S. at 605. Most recently, in *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the *Doyle* logic was reiterated:

> ". . . the Miranda warnings emphasize the dangers of choosing to speak (whatever you say can and will be used as evidence against you in court) but give no warning of adverse consequences should you choose to remain silent. This imbalance of the delivery of Miranda warnings, we recognized in *Doyle*, implicitly assures the suspect that his silence will not be used against him." 103 S.Ct. at 924.

There Must Be Meaning In Miranda And The Fifth Amendment

Comment by a prosecutor on the exercise of the Fifth Amendment privilege against self-incrimination diminishes the privilege by making its assertion costly and accordingly, both due process and the Fifth Amendment forbid evidentiary use of a defendant's claim of that privilege in the wake of Miranda warnings. *Griffin* v. *California*, 380 U.S. 609 (1965). Invoking one's right to silence in the wake of Miranda warnings is tantamount to assertion of the Fifth Amendment, of course.

Silence is definitely not physical evidence and is not testimonial in a technical sense. However, it is inextricably tied to the testimonial option not to incriminate one's self, protected by the Fifth Amendment. As a practical matter, if this option/decisional "conduct" is not protected against use by the prosecution, no Fifth Amendment protection would exist with respect to a defendant such as Greenfield. According to Petitioner's argument, there would be no alternative to self-incrimination for a defendant such as Greenfield, who may have available to himself the defense of insanity. He would either incriminate himself by inference from silence or by verbal means. *Greenfield* v. *Wainright*, 741 F.2d 329 n.6 (11th Cir. 1984). Respondent suggests that *Doyle* does not envision putting a criminal defendant to this choice, especially when the choice is induced by the assurances contained in the Miranda warnings.

The Unfairness Of It All—Misplaced Reliance And A Price On Silence

Nothing in the Miranda warnings given to Greenfield limited them to the instance where guilt, rather than sanity, would be the issue. Since *Doyle*, this Court has consistently prohibited the use of post-arrest, post-Miranda silence, reasoning that silence which may be induced by the implicit assurances contained in the Miranda warnings should not, as a matter of fundamental fairness, be used by the prosecutor. *Fletcher* v. *Weir*, supra, *Jenkins* v. *Anderson*, supra, *Anderson* v. *Charles*, 447 U.S. 404 (1980).[11] Doyle recognizes the implicit

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[11] To the extent Petitioner relies on *South Dakota* v. *Neville* as authority for the use of post-arrest, post-Miranda silence, it should be noted that the evidence sought to be used, the defendant's refusal to take a blood alcohol test, did not rise to constitutional dimension, as the defendant's right to refuse the blood alcohol test was referred to as "a matter of grace bestowed by the South Dakota legislature." 103 S.Ct. at 924.

assurance made to a defendant that he will not be penalized if he chooses to exercise his Miranda rights. 426 U.S. at 618. A defendant whose defense is insanity is no less entitled to shielding from this penalty than a defendant with a more traditional defense.[12] The rationale underlying the prohibition against the use of silence remains:

> "To permit the state to benefit from the fruits of its own deceptions violates the due process clause of the Fourteenth Amendment and Article I, § 9 of the Florida Constitution." *State of Florida* v. *Burwick*, 442 So. 2d 944, 948 (Fla. 1983) cert. denied ___ U.S. ___, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984).

On page 23 of his brief, Petitioner argues that the inference of guilt by silence does not "logically or reasonably apply to the issue of mental competency." Petitioner, in making this assertion, ignores that the inference to be drawn from silence, whether used to establish guilt by silence or sanity, results in the same ultimate use, to establish criminal culpability.

In the traditional sense, the obvious inference to be drawn from post-arrest silence is guilt. The use of Greenfield's silence and his invocation of his right to counsel were clearly an attempt by the prosecutor to draw meaning, i.e., sanity and guilt, from that silence and Sixth Amendment assertion. In Florida, insanity equates with innocence.[13] Accordingly, it would not be proper for the

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[12] If the rule were otherwise, a warning would be required to say: If you say anything it will be used against you; if you do not say anything, that will be used against you . . . (too) ." *McCarthy* v. *United States*, 25 F.2d 298, 299 (6th Cir. 1928).

[13] *State Ex Rel Boyd* v. *Green*, 355 So.2d 789, 793, (Fla. 1978) (The basis of an insanity defense is that a person is unable to form the requisite intent. Since intent is an element of most crimes, a lack of intent precludes criminal responsibility. at 792. Insanity specifically

prosecutor to ask a jury to draw a direct inference of guilt from silence and to argue, in effect, that silence is inconsistent with innocence (insanity). *State of Florida* v. *Burwick*, supra.

The speciousness of a distinction between "guilt" and "sanity" for purposes of applying *Miranda* and *Doyle* has been recognized in opinions in various state courts.[14] In Florida, mental intent is an essential element of a criminal offense, which must be proven beyond a reasonable doubt and which should not, therefore, be relegated to an "after-the-fact" issue, as seemingly suggested by Petitioner.

There Can Be No Constitutional Distinction Between Defenses In Applying Doyle

This Court has admonished that the insanity defense cannot, any more than any other defense, be prejudiced by the admission of unconstitutionally seized evidence. *Kaufman* v. *United States*, 394 U.S. 217, 230, (1969). Accordingly, a defendant who raises an insanity defense

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contemplates the lack of an essential element of the crime, i.e., intent. 355 So.2d at 793).

Since 1902, the test of legal insanity in Florida is the "M'Naghten Rule" or "right-wrong test." *Davis* v. *State*, 32 So. 822 (Fla. 1902), as affirmed and modified: *Wheeler* v. *State*, 344 So.2d 244 (Fla. 1977) cert. denied 440 U.S. 924 (1979).

[14] See e.g. *People* v. *Rucker*, 26 Cal. 3rd 368 (1980), in which the California Supreme Court found "irrelevant" a purported distinction between substantive use of evidence obtained in violation of Miranda and its use to show an ability to respond logically. In *Commonwealth* v. *Mahdi*, 448 N.E.2d 704 (Mass. 1983), the Massachusetts Supreme Court stated:

> "The ultimate constitutional right at issue is still the right to remain silent . . . fundamental unfairness results from the use of evidence of such silence regardless whether the person exercising his or her constitutional right to remain silent claims insanity as a defense."

should not be any less entitled to the protection of due process simply because the crux of his case revolves around his mental state. Even when sanity is the sole issue, the use of post-Miranda silence is no less egregious than in any other case and no less a penalty. Elementary fairness dictates that the invocation of rights will not be used to impeach a defense subsequently presented at trial. *Raley* v. *Ohio*, 360 U.S. 423, 437-440 (1959). That Greenfield raised an affirmative defense, for which he shouldered some burden, should not preclude application of the *Doyle* rule, as *Doyle* has been applied by various courts to affirmative defenses such as self-defense, duress and entrapment.[15]

Petitioner's reliance on *Sulie* v. *Duckworth*[16] is misplaced. That court was concerned only with the use of a defendant's post-Miranda request for an attorney and did not involve the use of a defendant's post-Miranda silence. The court specifically noted that "evidence of his silence would not be admissible against him in his criminal trial." 689 F.2d 128, 129. *United States* v. *Trujillo*, 578 F.2d 285 (10th Cir. 1978), cert. denied 439 U.S. 858 (1978), is distinguishable on its facts. In that case, the court noted that "the government did not exploit post-arrest silence," citing *United States* v. *Hale*, and in light of that statement, it can be safely assumed that had the government exploited or highlighted Trujillo's post-Miranda silence, the Tenth Circuit would not have been so tolerant. In the Greenfield trial, however, the prosecutor, during final summation, argued the significance of Greenfield's post-Miranda silence and request for an attorney, thereby highlighting Greenfield's silence and "striking at the jugular" of Greenfield's defense and improperly undermining that defense. See: *United States* v. *Harp*, 536 F.2d 601, 603 (5th Cir. 1976) (holding that remarks which strike at the jugular cannot be classified as harmless).

Jacks v. *Duckworth*, 651 F.2d 480 (7th Cir. 1981), also cited by Petitioner, is likewise distinguishable on its facts. Jacks did not remain silent after being given Miranda warnings and voluntarily and freely spoke with the arresting officer. The court specifically noted that neither *Doyle* nor *Hale* was applicable because the case did not involve the use of defendant's silence.

Petitioner offers no reason for retreating from *Doyle* which outweighs the protections afforded by a rule prohibiting the use of post-Miranda silence. Nor is there sufficient reason for excepting an insanity defendant's case from the protections afforded in *Doyle*, as *Doyle* applies its holding generally to all arrested defendants and does not distinguish between defenses in its treatment of the "dubious probative value" of silence and the unfair use of silence in the face of the Miranda assurance. When balancing interests, as suggested in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), it is useful to consider both ends of the proverbial scale. The right to silence should not be unduly burdened and any relevancy or pro-

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[15] Cases applying *Doyle* where affirmative defense raised: *Reid* v. *Riddle*, 550 F.2d 1003 (4th Cir. 1977) (self-defense); *United States Ex Rel Allen* v. *Franzen*, 659 F.2d 745 (7th Cir. 1981), cert. denied 456 U.S. 928 (1982) (self defense); *United States* v. *Harp*, 536 F.2d 601 (5th Cir. 1976) (duress); *United States* v. *Curtis*, 644 F.2d 263 (3rd Cir. 1981) cert. denied 459 U.S. 1018 (1982) (entrapment); *Morgan* v. *Hall*, 569 F.2d 1161 (1st Cir. 1978) cert. denied 437 U.S. 910 (1978) (consent in rape case). Even where the defendant admits the physical acts constituting the offense, *Doyle* has been applied where the defendant's mental state is at issue. See: *United States* v. *Johnson*, 558 F.2d 1225 (5th Cir. 1977) (defense of lack of knowledge); *United States* v. *Meneses-Davila*, 580 F.2d 888 (5th Cir. 1978) (lack of knowledge).

[16] 689 F.2d 128 (7th Cir. 1982), cert. denied 460 U.S. 1043, (1983).

bativeness of that silence must be so compelling in a given situation as to far outweigh the elasticity of the protections provided by *Doyle*. There is no valid evidentiary or constitutional reason for retreating from *Doyle*, simply because the defense of insanity is presented, as opposed to a more traditional defense.

II.

WHETHER DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE INTRODUCTION OF TESTIMONY CONCERNING DEFENDANT'S POST-MIRANDA SILENCE CONSTITUTES A PROCEDURAL DEFAULT BARRING REVIEW UNDER *WAINWRIGHT* V. *SYKES*, 433 U.S. 72 (1977), WHERE DEFENSE COUNSEL OBJECTED TO THE PROSECUTOR'S COMMENT UPON DEFENDANT'S POST-MIRANDA SILENCE DURING SUMMATION AND THE STATE APPELLATE COURT ADDRESSED THE MERITS OF THE ISSUE, OR WHETHER REVIEW BY THIS COURT SHOULD BE DENIED BECAUSE PETITIONER FAILED TO RAISE THE *WAINWRIGHT* V. *SYKES* QUESTION IN THE COURT OF APPEALS EXCEPT IN A PETITION FOR REHEARING?

The *Wainwright* v. *Sykes* Issue Is Not Properly Before The Court

For the first time since the United States Magistrate entered his Report and Recommendation (JA 47), with the exception of Petitioner's Motion for Rehearing filed with the Eleventh Circuit, Petitioner asserts that consideration of this significant constitutional issue is barred by *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Petitioner did not assign as error in the court below the issue he now asks this Court to review. Neither was the applicability of *Wainwright* v. *Sykes* considered by the court below, other than parenthetically in a footnote in the decision (JA 10).

The issue of waiver was fully litigated in the District Court. Evidentiary proceedings were held on the issue over which the United States Magistrate presided, with

Greenfield presenting a "cause" and "prejudice" defense to the allegation of waiver (see transcript of evidentiary hearing held October 3, 1980). The Magistrate made specific findings and recommended that the case not be dismissed under *Wainwright* v. *Sykes* (JA 47). The Petitioner did not, as he had a right and obligation to do, file written objections to the proposed findings and recommendations of the Magistrate, as required by 28 U.S.C. § 636(b)(1), Local Rule 6.102, Rules for the United States District Court, Middle District of Florida and *Nettles* v. *Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc). Apparently satisfied with the adverse decision of the District Court on the merits, Petitioner did not raise the *Wainwright* v. *Sykes* issue by way of cross-appeal or otherwise. Only belatedly, in his petition for Rehearing to the Eleventh Circuit Court of Appeals, did Petitioner raise the issue (JA 38). Having failed to assign the issue as error in the court below, Petitioner should not now be heard to complain. *Sonzinsky* v. *United States*, 300 U.S. 506, 514 (1937). *Dorszynski* v. *United States*, 418 U.S. 424, 431 n.7 (1974). *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973) ("We cannot decide issues raised for the first time here.") Furthermore, considerations of judicial efficiency demand that a *Sykes* claim be presented before a case reaches the Supreme Court. *Jenkins* v. *Anderson*, 447 U.S. 231, 234, n.1.

Alternatively, Review Is Not Barred By *Wainwright* v. *Sykes*, As The Issue Was Preserved By Proper Objection And Was Addressed On The Merits By The State Appellate Court.

Greenfield's counsel made appropriate objections, brought the issue to the attention of the state court in accordance with then-existing state procedural rules and otherwise preserved the issue for appeal. The state trial court and the state appellate court addressed the merits

of the issue. Furthermore, the record reflects that there was adequate cause for any failure to object and Petitioner suffered prejudice as a result of that cause.

Petitioner's contention that Greenfield has failed to make a contemporaneous objection is tenuous at best. Notwithstanding Greenfield's counsel's failure to object during the state's case in chief when the testimony of Officers Pilifant and Jolley was elicited, he strenuously objected during the prosecutor's final argument when actual use was made of the silence. (SR-339; JA 97, 98). Since the prosecutor's remarks during summation were in themselves violative of *Doyle* and were directed to the same testimony which came in without objection, it cannot be said that there has been a waiver under the rationale of *Sykes*, since the related objection sufficiently raised the constitutional issue. See: *Thomas* v. *Estelle*, 582 F.2d 939 (5th Cir. 1978); *Collins* v. *Auger*, 577 F.2d 1107 (8th Cir. 1978), cert. denied 439 U.S. 1133 (1979). *Griffin* v. *California*, supra.

In *Sykes*, the contemporaneous objection/waiver rule arose where the trial court, because of a lack of objection, had no opportunity to correct the defect and avoid problematic retrials. One of this Court's concerns in *Sykes* was that a defendant's counsel might "sandbag" the court and gamble on an acquittal while saving a dispositive claim in case the gamble didn't pay off. 433 U.S. at 89-90. However, in the instant case, it can hardly be said that Greenfield's attorney "sandbagged" the court. When he objected during the prosecutor's final summation which highlighted Greenfield's post-Miranda silence, the trial court had the "opportunity to correct the defect and avoid problematic retrials." (JA 97, 98) The jury could have been instructed, the prosecutor admonished and the only question left for consideration would have been whether

harmless error existed. Furthermore, this record reflects that counsel's failure to object was the result of a combination of inattentiveness and the rigors of a hotly contested trial and a complex defense (See generally: transcript of evidentiary hearing held October 3, 1980 before the Magistrate).

That defense counsel's failure to object was not a purposeful "sandbagging" of the trial court is further evidenced by counsel's many attempts to have the issue ruled upon by the trial court. Not only did he object and offer argument during the prosecutor's summation, he filed and argued a Motion for New Trial (Petitioner's Exhibits No. 1 and 3, submitted to the District Court) and filed an assignment of errors for purposes of appeal. (Petitioner's Exhibit No. 4). In sum, defense counsel did everything he could do to present the issue to the trial court and thereby preserve it for appellate review.

The State Appellate Court Addressed The Merits Of The Issue And Therefore Federal Review Is Not Barred By *Wainwright* v. *Sykes*

Petitioner suggests that the Florida appellate court only alternatively addressed the merits of the constitutional issue before this Court for review. By inference, Petitioner is suggesting that the state appellate court cannot be said to have addressed the merits of the issue, because the case was remanded by the Florida Supreme Court and per curiam affirmed by the Second District Court of Appeal (Petitioner's br. at pp. 29, 30). This suggestion is dispelled by the Florida Supreme Court's acceptance of conflict certiorari[17] in *State of Florida* v. *Burwick*, supra, in which that court disposed of conflict

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[17] Art V, § 3(b)(3), Florida Constitution.

between the Second District of Appeal's opinion in *Greenfield* v. *State*, 337 So.2d 1021 (Fla. 2nd DCA 1976) and *Burwick* v. *State*, 408 So.2d 722 (Fla. 1st DCA 1982). The Florida Supreme Court apparently considered that the Second District Court of Appeal had reached the merits of this important constitutional issue in Greenfield's appeal and accordingly, it is properly and appropriately preserved for review by this Court.

Where a state appellate court reaches the merits of a claim which would otherwise be barred from federal review because of a procedural default, the federal court is obligated to consider the claim on the merits. *Lebowitz* v. *Wainwright*, 670 F.2d 974, 978 n.8 (11th Cir. 1982), citing *Lefkowitz* v. *Newsome*, 420 U.S. 283, 292 (1975).[18] *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 147-154 (1979); *Engle* v. *Isaac*, 456 U.S. 107, 135 n.44 (1982). *Sykes* deals "only with contentions of federal law which were not resolved on the merits in a state proceeding due to one's failure to raise them as required by state procedure," and creates no bar to independent determination by the federal court where the merits were reviewed by the state court. 433 U.S. at 72.

To the extent that Petitioner suggests that review is barred because Greenfield's trial counsel neglected to move for a mistrial in conjunction with his objection to the prosecutor's summation, Florida's requirement of a request for a mistrial is a matter of decisional case law which evolved *after* Greenfield's trial rather than a specific procedural rule. A *Wainwright* v. *Sykes* waiver must

[18] See: n. 9 at 420 U.S. 292; *Newman* v. *Henderson*, 425 U.S. 967 (1976), granting Petition for Writ of Certiorari and remanding Habeas Corpus case for further consideration, citing *Lefkowitz* v. *Newsome*, supra.

be from a specific state procedural rule. *Freeman* v. *State*, 599 F.2d. 65, 71 (5th Cir. 1979), cert. denied 444 U.S. 1013 (1980).

Clark v. *State*, 363 So.2d 331 (Fla. 1978) cited by Petitioner as authority for the procedural default, was decided *after* Petitioner's trial. *Clark* decided only ". . . whether a contemporaneous objection is necessary to preserve as a point on appeal . . ." 363 So.2d at 332. Furthermore, *Clark* has been clarified by the Florida Supreme Court, which has determined that a motion for mistrial is not necessary to preserve the matter for appellate review, where a defendant has, by objecting, brought the error to the court's attention. *Simpson* v. *State*, 418 So.2d 984, 986 (Fla. 1982) cert. denied. 459 U.S. 1156 (1982).

Cause And Prejudice Are Present

Although evidentiary proceedings were held before the United States Magistrate on the *Sykes* issue and on whether cause and prejudice existed to overcome the procedural default alleged, the Magistrate did not address himself to these issues, finding that the matter had been preserved in the state court by proper objection and in any event, the state appellate court had addressed itself to the merits of the issue (JA 49, 43).

Independent of the Magistrate's findings, there exists "cause" for counsel's failure to object and "prejudice" which warrants federal review. *Wainwright* v. *Sykes*, 443 U.S. 72, 87. The "cause" requirement may be satisfied under certain circumstances when a procedural default is not attributable to an intentional decision by counsel made in pursuit of his client's interests. *Reed* v. *Ross*, ___ U.S. ___, 104 S.Ct. 2908 (1984) (failure of counsel to raise a constitutional issue reasonably unknown to him held to

be one situation in which "cause" requirement is met). It follows, therefore, that counsel's neglect or inattentiveness, rising to the level of ineffectiveness, should satisfy the "cause" requirement. See: e.g. *Alston* v. *Garrison*, 720 F.2d 812 (4th Cir. 1983), (where the failure to object to evidence of defendant's post-Miranda silence was prejudicial under the two prong test where such evidence came in on three occasions with a failure to object); *Boyer* v. *Patton*, 579 F.2d 284 (3rd Cir. 1978) (where failure to object to use of silence constitutes ineffective assistance of counsel and is prejudicial because of the egregious nature of the error).

During the evidentiary hearing before the Magistrate, Greenfield's trial attorney explained that he had a "whole desk full of depositions," and was dealing with three psychiatrists while the trial was going on, in this "very, very complex case" (TR p. 14). The questioning concerning Greenfield's silence "didn't ring a bell at the time of trial as far as making ar. objection" due to counsel's admitted inadvertance (TR 17). However, when the prosecutor focused on and stressed the silence in his closing remarks, trial counsel recognized the error and objected (Tr 8, 17). According to counsel, he didn't know if the questions even registered in his mind (TR 27).

There can be no doubt that counsel, when it finally dawned on him that comment was being made on his client's silence, recognized the error and objected. He was aware of the constitutional significance of the error (TR 6). Given counsel's admissions that the questioning did not "ring the bell," it cannot be said that his failure to object was an intentional decision made in pursuit of his client's interests. *Reed* v. *Ross*, supra. That he was aware of the constitutional significance of the error but was busy with other things such that the questioning did not "register"

with him underscores counsel's negligence and inattentiveness. This conduct falls well below the role required of counsel and which is necessary to insure that the trial is fair. *Strickland* v. *Washington*, ___ U.S. ___, 104 S.Ct. 2052, 2063 (1984). In this instance, counsel's neglect and inattentiveness allowed a prosecutor to not only bring forth evidence of Greenfield's post-Miranda silence but to argue it as probative to Greenfield's sanity, which undermined the only defense available to Greenfield.

In this close case, in which the jury ultimately had to consider the conflicting testimony of the expert witnesses who testified concerning Greenfield's mental status, it cannot be said that the prosecutor's use of Greenfield's silence did not prejudice the defense. Nor can it be said that the jury's consideration of Greenfield's post-arrest silence "had no effect on the judgment." *Strickland* v. *Washington*, 104 S.Ct. at 2067.

A Miscarriage Of Justice

In *Sykes*, this Court stated that its cause and prejudice standard would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice" 433 U.S. at 91. Accordingly, even if this Court were to determine that counsel's failure to object during the course of the trial constituted a procedural default, given the nature of the constitutional violation under *Doyle*, and the reason for the default, Greenfield will indeed be "a victim of a miscarriage of justice" if review is barred. His due process rights will have been trampled upon because of counsel's neglect or inattentiveness. The very rationale underlying *Doyle*, that use of post-Miranda silence is "fundamentally unfair," renders application of *Wain-*

wright v. *Sykes* to Greenfield's case a "miscarriage of justice."

CONCLUSION

Based upon the foregoing argument and citations of authority, Respondent asks this Court to affirm the Eleventh Circuit Court of Appeals and hold that, absent testimony from a defendant which places his credibility in issue, it is fundamentally unfair and a violation of due process to use or comment upon a defendant's post-arrest, post-Miranda silence and his request for counsel, regardless of the defense raised.

Further, Respondent asks this Court to decline to review the *Wainwright* v. *Sykes* issue raised by Petitioner bacause of Petitioner's failure to preserve this issue for review or alternatively, to hold that Respondent properly preserved the constitutional issue raised in this case through appropriate objection and presentation of the merits of the issue to and consideration by the state appellate court.

Respectfully Submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Case No. 84-1480

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Petitioner,

v.

DAVID WAYNE GREENFIELD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER ON THE MERITS

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ARGUMENT

QUESTION I

WHETHER A DEFENDANT'S POST-MIRANDA WARNING BEHAVIOR, INCLUDING SILENCE, MAY BE USED AS SUBSTANTIVE EVIDENCE OF HIS SANITY AT OR NEAR THE TIME OF THE OFFENSE WHEN THAT DEFENDANT ELECTS TO PRESENT AN INSANITY DEFENSE, OR WHETHER SUCH USE OF POST-MIRANDA[1] SILENCE IS VIOLATIVE OF DOYLE V. OHIO, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)?

Despite the simple fact that no contemporaneous objection was made at trial to the testimony of Officers Pilifant and Jolley and that the only objection registered was to the prosecutor's allegedly improper comment on the defendant's exercise of his right to remain silent (JA 97 - 98), respondent now argues that the officers' testimony and the comments thereon were irrelevant to the sanity

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

issue.[2] (Respondent's brief at pp. 11 - 20) Had such an objection been made at trial,[3] the relevancy of this testimony could have been thoroughly explored. Expert witnesses could have, for example, been asked their opinions on the relationship between respondent's behavior at the time of his arrest, just two hours after the offense, and his sanity or lack

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[2] In fact, the relevance of the challenged testimony was never seriously challenged until the Eleventh Circuit's declaration in the case at bar that the evidence was not probative of sanity. Greenfield v. Wainwright, 741 F.2d 329 (11th Cir. 1984) at 333, 334. The Second District Court of Appeal, in addressing in the alternative the merits of this issue on direct appeal found the testimony to be "certainly . . . relevant." Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976) at 1023.

[3] It is a well settled principle of Florida law that a defendant cannot on appeal of an issue rely on grounds different than those presented by objection in the trial court. See e.g., Lucas v. State, 376 So.2d 1149 (Fla. 1979); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

thereof at the time of the offense. As it is, we are left with respondent's contention, supported with citations to psychiatric authorities that silence may not always be indicative of sanity.

We are also left with the state trial record in this cause which contains the testimony of defense psychiatrist George Lose that he examined respondent approximately two months after the offense and opined that respondent did not know right from wrong at the time the offense was committed. (SR 117, 126) Dr. Lose explained the basis for his opinion in some detail, noting the types of answers given by respondent to Dr. Lose's questions, and why these responses, given two months after the offense tended to establish respondent's legal insanity at the time of the offense. See e.g., SR 128, 129, 133.

Surely the trial jury, which bore the ultimate responsibility to determine sanity, could properly consider respondent's comments and responses to Officers Pilifant and Jolley in light of Dr. Lose's testimony in order to draw its own conclusion.

In his brief, respondent criticizes petitioner for characterizing the officers' testimony as demeanor evidence. (Respondent's brief at 14). Respondent misses the point that the officers' statements concerning respondent's affirmative invocation of his rights are an integral part of that testimony pertaining to respondent's behavior at the time of arrest, (JA 71 - 81), all of which bore on respondent's understanding and awareness of what was going on around him at a point in time close to the offense. Cf. United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied, 439 U.S. 858, 99

S.Ct. 175, 58 L.Ed.2d 166 (1978).

Respondent argues that no distinctions can be drawn between use of post-arrest silence to establish guilt of the substantive offense charged and use of silence as evidence tending to show sanity; and that silence cannot be used to rebut an insanity defense any more than it could be used to rebut any other affirmative defense. Yet, the insanity defense has frequently been treated differently than other defenses with certain burdens being imposed on individuals who seek to rely on the defense. In both federal and Florida courts the defense must be raised by pretrial notice. Rule 12.2(a), Federal Rules of Criminal Procedure; Rule 3.216 (b), Florida Rules of Criminal Procedure. A defendant raising an insanity defense may be compelled to submit to a court ordered psychiatric examination and

statements made by the defendant during the course of the examination may be admitted into evidence on the issue of sanity. Cf. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); United States v. Halbert, 712 F.2d 388 (9th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 997, 79 L.Ed.2d 230 (1984).

Neither the Fifth Amendment, nor this Court's holdings in Doyle, supra, and United States v. Hale, 422 U.S. 71, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) are compromised by the admission of respondent's post-Miranda warning behavior including silence on the nebulous issue of sanity. The judgment of the Eleventh Circuit should be reversed.

QUESTION II

WHETHER THE COURT OF APPEALS DECISION IN THE INSTANT CASE WHICH REACHED THIS CAUSE ON THE MERITS IS IN CONFLICT WITH THIS COURT'S DECISION IN WAINWRIGHT V. SYKES, 433 U.S. 72, 97 S.CT. 2497, 53 L.ED.2d 594 (1977), WHERE RESPONDENT'S CLAIM WAS BARRED BY HIS FAILURE TO COMPLY WITH FLORIDA'S CONTEMPORANEOUS OBJECTION RULE?

The Court of Appeals below elected to address the merits of Wainwright's procedural default claim notwithstanding the fact that it had not been briefed in that Court.[4] Petitioner argued the errors in the resolution of the Sykes claim on rehearing. (JA 38 - 45) Thus, this is not an instance in which the lower court had no opportunity to consider the claim, and

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[4] The procedural default claim was vigorously pursued in the district court. (R 162 - 171, 17 - 26).

it is therefore properly before this Court.[5] Cf. Dorszynski v. United States, 418 U.S. 424, 94 S.Ct. 3042, 41 L.Ed.2d 855, n. 7 (1974); Tacon v. Arizona, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973).

Respondent's allegation that the objection to the prosecutor's comment was sufficient to preserve the issue for appeal lacks adequate support in Florida case law. Where no objection is made to testimony, it will be regarded as having been received by consent and its admissibility will not be considered on appeal, McCullers v. State, 143 So.2d 909 (Fla. 1 DCA 1962). Reversible error cannot be

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[5]By analogy it would seem that if a federal court can consider the merits of a claim when the state court ignores a procedral default, this Court also must have the power to address the merits of an issue reached by a Court of Appeals. Cf. County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

predicated upon the admission of evidence to which no objection was made at trial. Albano v. State, 89 So.2d 342 (Fla. 1956). It is proper for the prosecutor to comment on properly admitted evidence in his closing argument. Cf. Blair v. State, 406 So.2d 103, 1106 (Fla. 1981); Wilson v. State, 305 So.2d 50, 52 (Fla. 3 DCA 1974); 55 Fla. Jur. 2d, Trial §107 pp. 511 - 512 (1984).

In both Thomas v. Estelle, 582 F.2d 939 (5th Cir. 1978) and Collins v. Auger, 577 F.2d 1107 (8th Cir. 1978) relied on by respondent for the proposition that the objection at bar was adequate, the defendants made timely, if inartful, objections to the tesitmony they took exception with. Neither was a situation in which testimony was allowed to come in without objection until the prosecutor attempted to argue facts in evidence to the jury. For this

reason, both Thomas and Collins are inapposite here.

The United States magistrate did not address respondent's claim that cause and prejudice existed for the failure to object to the testimony of Officers Pilifant and Jolley. (JA - 53) Respondent has never raised an ineffective assistance of counsel claim.

At the time of trial, petitioner's counsel had to be aware that the testimony in question might be objectionable. See Bennett v. State, 316 So.2d 41 (Fla. 1975); Jones v. State, 200 So.2d 574 (Fla. 3 DCA 1967). Thus the issue was not one which had no reasonable basis in existing law so as to provide "cause" for the failure to object. Cf. Reed v. Ross, 468 U.S. __, 104 S.Ct. ___, 82 L.Ed.2d 1 (1984). Respondent has not shown cause for his

failure to object. Cf. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). reh. den. 73 L.Ed.2d 1296 (1982).

This court should reaffirm the continuing validity of Wainwright v. Sykes, supra and Engle v. Isaac, supra and reverse the Eleventh Circuit's holding that an untimely objection or objections may substitute for a proper contemporaneous objection.

CONCLUSION

Based on the arguments contained herein and the petitioner's opening brief on the merits, petitioner asks this Court to hold that a defendant's post-Miranda conduct, including silence, may be admitted at trial when sanity is the principal issue and when the behavior is sufficiently contemporaneous in time to the offense charged as to be relevant evidence of the defendant's mental state at the time of the offense.

Petitioner also asks this Court to hold that since the Florida Courts enforced Florida's contemporaneous objection rule in this case, respondent's petition for habeas corpus was subject to dismissal under Wainwright v. Sykes, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ann Garrison Paschall, Counsel for Petitioner, and a member of the Bar of this Court, hereby certify that on the 28th day of October, 1985, I served three copies of the Petitioner's Reply Brief on the Merits on James D. Whittemore, Esq., Counsel for Respondent, One Tampa City Center, Suite 2470, Tampa, Florida 33602, by depositing with the United States Postal Service a duly addressed envelope with postage prepaid. All parties required to be served have been served.

Ann Garrison Paschall
OF COUNSEL FOR PETITIONER

No. 84-1480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State of Florida,

Petitioner,

v.

DAVID WAYNE GREENFIELD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ILLINOIS PSYCHOLOGICAL ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE ILLINOIS PSYCHOLOGICAL ASSOCIATION

The Illinois Psychological Association (IPA) hereby respectfully moves for leave to file a brief *amicus curiae* in the above-captioned case in support of the Respondent. The consent of the attorney for the Respondent has been obtained, and his letter evidencing that fact is filed with the copies of this brief. The consent of the attorney for the Petitioner was requested but was refused.

The Illinois Psychological Association has more than 1300 members, and it is the major association of psychologists in Illinois. The case *sub judice* turns, at least in part, on the clinical-diagnostic significance of the silence

of the defendant at the time of his arrest as it impinges upon his sanity at the time of the commission of the offense. The Illinois Psychological Association does not possess unique information relevant to the clinical considerations, and, indeed, any state psychological association or the parent, national psychological association could act in the same role as *amicus curiae*. However, because there currently are pending two cases before the Supreme Court of Illinois on precisely the issue in this case, the Illinois Psychological Association has a more immediate interest in the clinical issues implicated in all the cases.

Accordingly, the *amicus* Association is in a position to assess for the Court the clinical-diagnostic significance of the "silence" involved in the invoking of *Miranda* rights at a level of expertise that the Respondent cannot fairly be expected to address. Thus, the Illinois Psychological Association respectfully requests leave to file the attached brief *amicus curiae*. The arguments set forth in this brief *amicus curiae* are relevant to disposition of this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE ILLINOIS PSYCHOLOGICAL ASSOCIATION

INTEREST OF *AMICUS CURIAE*

The Illinois Psychological Association (IPA) files this brief as *amicus curiae*. The IPA is a voluntary nonprofit, scientific, and professional organization with more than 1300 members. It has been the major association of psychologists in Illinois since 1949 and includes the vast majority of psychologists holding doctoral degrees from accredited universities in the State of Illinois. The IPA's purpose, as reflected in its bylaws, is to promote the

welfare of the public at large through the scientific and professional endeavors of psychology.

Well over half of the IPA's members are involved in the diagnosis and treatment of mild to serious abnormal conditions. In addition, many professional psychologists serve as forensic experts in criminal trials where the defendant's mental state is at issue. Several IPA members with special training and knowledge participated in the production of the American Bar Association's *First Tentative Draft of the Criminal Justice Mental Health Standards* (1983). Many of the Association's substantive sections are also vitally interested in the matters at issue here. Of particular interest is the fact that the precise issue involved in this case is pending before the Illinois Supreme Court in two cases, one involving the death penalty.

Thus, this case is of special concern to psychologists and to the IPA. The IPA is honored to be allowed to present its views on the important questions before the Court, questions on which its expertise and experience can, it trusts, be useful. *Amicus* hopes to provide this Court with a broad-based, empirically oriented perspective in order to help it resolve the complex issues presented by this case.

STATEMENT OF THE ISSUE PRESENTED

Is testimony regarding a criminal defendant's act of invoking the Fifth Amendment right to silence after receiving *Miranda* warnings probative of sanity for purposes of refuting the defense of insanity?

INTRODUCTION AND SUMMARY OF ARGUMENT

In the case at bar, the Petitioner urges that assertion of the Fifth Amendment right to silence after *Miranda* warnings is probative of sanity and should be admissible to refute the defense of insanity. This argument rests on the dual assumptions that the wish to remain silent reflects rational, mature, lucid decision-making and judgment and that psychosis, the basis for the Respondent's insanity defense, is definitionally characterized by illogic, incoherence, and the absence of lucidity and judgment. Such assumptions, which are essential to the Petitioner's argument, are incorrect scientifically.

A few cases of severe mental disorder do resemble the popular idea that "crazy" people show total lack of contact, babbling speech, and purposeless activity. Most do not. In fact, a great deal of mental functioning remains intact even in cases of profound disturbance, and mental disorder is not synonymous with mental retardation. The symptom picture may differ markedly from one disordered person to another and in the same individual from time to time. Even in so complex a range of abnormal conditions, the fact of "silence," either literal mutism or the active assertion of the right to remain silent, ordinarily is not determinative of a diagnosis. The scientific literature cited in this brief *amicus curiae* supports the opinion of the Court of Appeals for the Eleventh Circuit.

ARGUMENT

TESTIMONY REGARDING A CRIMINAL DEFENDANT'S ASSERTION OF THE FIFTH AMENDMENT RIGHT TO SILENCE AND/OR THE RIGHT TO COUNSEL WHICH STEMS FROM THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION SHOULD NOT BE ADMISSIBLE. IT IS NOT SUFFICIENTLY PROBATIVE TO OUTWEIGH THE CONSTITUTIONAL PROHIBITION AGAINST PENALIZING A DEFENDANT FOR ASSERTING HIS RIGHTS BY USING THAT FACT AS EVIDENCE AT TRIAL.

A.

The Defendant's Exercise Of His Fifth Amendment Right To Remain Silent Is Not Probative Of Sanity.

No special expertise is required to identify profoundly bizarre and deviant behavior as "abnormal." The person who responds to disembodied voices of absent beings, who sees things no one else sees, and who announces special powers such as clairvoyance or mental telepathy is quickly recognized as "crazy" by the proverbial man in the street. But the notion that this severely disturbed individual represents the typical case of mental disorder is an all too common misconception belied by the subtlety involved in diagnosis of mental disturbance by psychologists and psychiatrists. Publication in 1980 of the Third Edition of the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association (hereinafter cited as "DSM-III") occurred only after five years of study and preparation by a large task force representing a variety of professional groups and interests. The extensive printed text in the DSM-III attests to the complexity of mental disorders and their diagnoses.

Occasional cases of severe disorder do indeed meet the popular notions about "crazy" people. Delirious mania, the most intense state of bipolar disorder (formerly known as manic-depressive illness), is characterized by incoherent speech, constant and purposeless activity, and total lack of contact. Likewise, chronic organic brain syndromes result over time in impairment of orientation, memory, intellect, judgment, and affect, and may ultimately require custodial care. A. Freedman, H. Kaplan, and B. Sadock, *Modern Synopsis of Comprehensive Textbook of Psychiatry-II*, 500, 526 (2d ed. 1976) (hereinafter cited as "*Synopsis*"). But impairment of this degree is the exception rather than the rule. Most persons who suffer mental disorders, even those which are severe enough to support an insanity defense, do not match the stereotypical notions of

> a weird lot who spend their time ranting and raving, posing as Napoleon, or engaging in other bizarre behavior. In fact, most hospitalized patients are quite aware of what is going on around them, and only a small percentage exhibit behavior that might be labeled bizarre. The behavior of most mental patients, whether in a clinical setting or not, is indistinguishable in most respects from that of "normal" people.

J. Coleman, J. Butcher, and R. Carson, *Abnormal Psychology and Modern Life*, 7, 10 (7th ed. 1984) (hereinafter cited as "*Abnormal Psychology and Modern Life*").

In fact, mental functioning is generally left undisturbed even in so severe a disorder as schizophrenia. Consciousness, attention, orientation, and memory are unaffected, and intellectual capacity, including acquired knowledge and the ability to solve tasks, is comparable to that of the general population. J. Page, *Psychopathology*, 186 (1971) (hereinafter cited as "*Psychopathology*"); Mayer-Gross Slater and Roth, *Clinical Psychiatry*, 275-276 (3d ed. E.

Slater and M. Roth 1969) (hereinafter cited as "*Clinical Psychiatry*"). The Massachusetts Supreme Court was quite correct in holding that "[i]nsanity is not the equivalent of stupidity" in the context of an exercise of *Miranda* rights. *Commonwealth v. Mahdi*, 388 Mass. 679, 448 N.E. 2d 704, 713 (1983). Schizophrenia is also characterized by the absence of any single, unifying feature fundamental to the condition and necessary for its recognition, and the symptom picture may differ markedly from one schizophrenic person to another depending on his or her life situation and environmental circumstances. P. McHugh and P. Slavney, *The Perspectives of Psychiatry*, 59 (1983); *Abnormal Psychology and Modern Life*, 354; *Clinical Psychiatry*, 288. There is, in fact, an entire subclass of schizophrenia known as pseudoneurotic schizophrenia in which patients present predominantly neurotic symptoms and reveal schizophrenic abnormalities of thinking and emotional reaction only on close and careful examination. *Synopsis*, 450.

As a working definition for purposes of this brief, the term "psychosis" is regarded as the equivalent of "mental disease or defect," "mental disorder," "mental infirmity," "disease of the mind," or any other reference to mental illness, however it may be styled, as the threshold requirement of the insanity defense. Psychosis may be defined as follows:

> Mental disorder in which a person's mental capacity, affective response, and capacity to recognize reality, to communicate, and to relate to others are impaired enough to interfere with his capacity to deal with the ordinary demands of life.

Synopsis, at 1324.* The term psychosis is generic and includes both thought disorders and affective disorders. The primary characteristic of affective psychoses is disturbance in mood; thought and behavior disturbances are secondary characteristics. *Synopsis*, at 1280. While the affective psychoses satisfy the threshold requirement of the insanity defense, this brief focuses on the thought disorders in view of Respondent Greenfield's diagnosis of paranoid schizophrenia.

Under the heading thought disorders is found schizophrenia, the most frequently occurring psychosis, and the other paranoid states. Schizophrenia, representative of the thought disorders, is characterized primarily by a disturbance in thinking and behavior and secondarily by a disturbance in mood, the converse of the affective psychoses. *Synopsis*, at 1327. Respondent Greenfield was diagnosed as suffering from paranoid schizophrenia, a subcategory of the schizophrenic disorders. The essential features of this disorder are prominent persecutory or grandiose delusions, or hallucinations with a persecutory or grandiose content. DSM-III, 191. Separated only by degree are the paranoid disorders including paranoia and acute paranoid disorder.

> While paranoid psychoses are given a separate heading in the official psychoses nomenclature and (at least, in the case of paranoia) have long been recognized as a psychiatric disease entity, the conditions

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* The inclusion of the psychoses is consistent with the judicial formulation set forth in *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962), in which mental disease or defect is defined as including "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."

> have close similarities to paranoid schizophrenia, and many clinicians have believed that they should be regarded as varieties of the latter.

C. Hofling, *Textbook of Psychiatry for Medical Practice*, 404 (3d ed. 1975).

The Petitioner in this case urges that proof of Respondent's legal insanity as a result of paranoid schizophrenia is undermined and contradicted by evidence that he invoked the right to be silent after receiving warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Nowhere in the description of the psychoses listed in DSM-III does the concept of "silence" enter into consideration, and it is insignificant in arriving at a diagnosis of a psychotic condition. Similarly, there is absence of mention of any diagnostic significance of silence in the myriad of textbooks on clinical psychiatry and abnormal psychology, a fact which underscores the lack of importance attached to "silence" as a factor either indicating or ruling out mental disorder. The task of demonstrating the probative value of silence diagnostically is thus a logical impossibility comparable to proving that something does not exist.

There are, of course, two meanings of the word "silence." One refers to the complete absence of a response. This instance, in which the individual says nothing, is not only not helpful to the Petitioner's argument but in fact may be symptomatic of an underlying psychosis. An extreme clinical symptom known as "mutism" is synonymous with stupor. This is defined as:

> Disturbance of consciousness in which the patient is nonreactive to and unaware of his surroundings. Organically, it is synonymous with unconsciousness. In psychiatry, it is referred to as mutism and is commonly found in catatonia and psychotic depression.

Synopsis, 1317, 1331. Other conditions in which mutism may occur are mania, epilepsy, and delirium. 3 *American Handbook of Psychiatry*, 278 (2d ed. S. Arieti 1974). Mutisın may also refer to a less severe functional inhibition of speech and vocalization frequently found among schizophrenics, many of whom tend to be monosyllabic and to answer questions as briefly as possible without being altogether uncooperative. A. Freedman, H. Kaplan, B. Sadock, 1 *Comprehensive Textbook of Psychiatry-II*, 898 (2d ed. 1975) (hereinafter cited as "1 *Comprehensive Textbook*").

A second meaning of "silence" used in the legal context of this case is the affirmative act by the accused of asserting the right to remain silent after receiving *Miranda* warnings. This behavior is not inconsistent with and may even be suggestive of psychopathology. The individual who actively asserts his Fifth Amendment rights to silence and/or the assistance of counsel* may do so as a function of being a litigious, paranoid schizophrenic zealously guarding his delusional "rights" and aims.

> A common form of paranoia is the litigious type. . . . [I]t will usually be found that this type of paranoiac individual was always stubborn and insistent upon his "rights". . . . Fundamentally, it is often not a question of law and justice, as the patient insists, but of attempts to put others in the wrong, to show that he was right, that he is superior, in order that thereby his sensitive insecurity may be strengthened and the weak points of his personality may be protected.

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* Opinions on both sides of the instant question agree that the right to counsel in this context stems from the Fifth Amendment right against self-incrimination. *Greenfield v. Wainwright*, 741 F.2d 329, 336 (11th Cir. 1984); *Sulie v. Duckworth*, 689 F.2d 128, 130 (7th Cir. 1982). See *Miranda v. Arizona*, 384 U.S. 436 (1966).

L. Kolb and H. Brodie, *Modern Clinical Psychiatry*, 448 (1982). This description of litigiousness in paranoia applies as well to paranoid schizophrenia.

Even if the affirmative act of invoking the right to silence is not suggestive of pathology, it certainly is not inconsistent with psychosis. Schizophrenia is a thought disorder which frequently results in the inhibition of language.

> The majority of schizophrenics are uncommunicative. They rarely initiate conversation. If asked a direct question, they may give a brief answer, remain silent, or make some cryptic and seemingly irrelevant response. Since speech is a medium of interpersonal communication, the sparse or mystifying speech of the schizophrenic may reflect his alienation or disinterest in his social environment. Deluded patients may refrain from speaking because they are afraid to express inner thoughts or are ordered by voices to keep silent.

Psychopathology, 188. When schizophrenics do answer questions, it is often because that is the easiest way to meet the social demands in being questioned. R. White, *The Abnormal Personality*, 541 (1948) (hereinafter cited as "*Abnormal Personality*").

Schizophrenia is also characterized by linguistic patterns which superficially appear rational but in fact reflect severe disturbance. One example is echolalia, a phenomenon in which the individual repeats in his or her answers to the interviewer's questions the same words or phrases used by the examiner. To the untrained listener, such responses may appear to be a meaningful confirmation of the information sought. In fact, echolalia is thought to signal nothing more than the striving of a schizophrenic with impaired ideation to maintain an active rapport with the interviewer. "He acts much like somebody who is

learning a new language and who, in answering his teacher's questions, uses as many of the teacher's words in the strange language as he can possibly manage." 1 *Comprehensive Textbook*, 898. Thus, the questioner might conclude that the psychotic individual has engaged in an exercise of rational judgment when all that may be inferred properly from the communication is that the individual is markedly confused.

Another linguistic characteristic reflecting schizophrenic thought disturbance is the fact that syntax is disturbed less than the semantic meaning of the communication. It has been observed that the grammatical form of the answer usually is correct even though there has been a disruption in associations. The resulting communication may appear rational but in fact may be meaningless. B. Maher, "The Language of Schizophrenia: A Review and Interpretation," in J. Neale, G. Davison, and K. Price, *Contemporary Readings in Psychopathology*, 234 (1974). Of course, many schizophrenics do not exhibit language disturbance at all. *Id.*, 236.

There are other reasons why psychotic behavior including speech may be interpreted erroneously as normal. Paranoid schizophrenics, although agitated and argumentative, may remain essentially emotionally responsive, alert, and verbal. G. Davison and J. Neale, *Abnormal Psychology*, 405 (3d ed. 1982) (hereinafter cited as "*Abnormal Psychology*"). In addition, chronic schizophrenics are often capable of fulfilling the demands of reality while maintaining their delusional systems in a secretive and compartmentalized fashion, a process known as encapsulation. *Clinical Psychiatry*, 276. Some paranoid schizophrenics are able to keep

> an almost impassable gulf between the real and delusional world. . . . Nothing in their behaviour betrays their abnormality. They converse rationally about any

> topic, and may show natural emotional reactions, though restricted in intensity and warmth. A stranger may talk to them for hours without seeing anything unusual. Only if some special point is mentioned, the flow of delusions breaks out, as if a sluice-gate had opened. An entirely new person seems to be speaking.

Id., 292. An observer of encapsulated delusions thus has no way of knowing of the existence of the delusional belief unless "the right button is touched."

Another aspect of delusional belief in the schizophrenic is the manner in which its expression may be made quite believable, particularly to the naive observer. Delusional thought processes are not necessarily fragmented. *Abnormal Psychology*, 405. As a delusional belief becomes increasingly systematized, it is correspondingly less likely that the lay observer or listener will recognize it as a delusion. This phenomenon is not at all uncommon among persons who suffer from paranoia.

> Aside from the delusional system, such an individual may appear perfectly normal in conversation, emotionality, and conduct. Hallucinations and other obvious signs of psychopathology are rarely found. This normal appearance, together with the logical and coherent way in which the delusional ideas are presented, may make the individual most convincing.

Abnormal Psychology and Modern Life, 388.

This wide range of symptoms suggestive of or consistent with psychosis renders the assertion of the right to remain silent a problematical act from the point of view of the questioner who is required to interpret the behavior. An observer who has little or no background information available must read into the conduct of the accused what his or her own motivation might be under similar circumstances. If the course of action decided on

is consonant with the *observer's* reality as measured by lucid and rational standards, it is interpreted as evidence of "good," "intact," or "normal" judgment. See 1 *Comprehensive Textbook*, 795. But projections by observers of ambiguous conduct have no probative value with respect to the mental state of the actor. (Nothing expressed herein should be construed as proposing a limitation on the clinician's right to consider the clinical significance, if any, of silence in the context of the entire diagnostic syndrome.)

Sometimes, an appearance of lucidity and rationality may indeed reflect a moment of rational judgment. The symptom picture in schizophrenia may change markedly over time.

> Most schizophrenic people "fade in and out of reality" as a function of their own inner state and the environmental situation. They might be in "good contact" one day and evidence delusions and hallucinations the next.

Abnormal Psychology and Modern Life, 354. Unpredictable variability or inconsistency is, in fact, a specific characteristic of schizophrenia. A schizophrenic patient may be incapable at one moment of carrying on a simple conversation yet may compose a sensible letter or play a sophisticated game of chess a short time later. 1 *Comprehensive Textbook*, 622-623. Thus, an interval of genuinely rational decision-making at the time of an arrest does not in itself reflect the mental state of the individual at the time of the offense.

The opinion of the Eleventh Circuit Court of Appeals in the instant case is entirely consonant with the body of knowledge and expertise which "*amicus curiae* represents." The opinion recognizes the variety of mental disorders which may give rise to the insanity defense, the variability of psychosis over time and the wide range of

symptoms which may be present at different intervals, and the deceptive quality of the symptoms to the untrained observer. The opinion specifically discusses the persecutory delusions which may underlie a demand for legal protection. *Greenfield v. Wainwright*, 741 F.2d 329, 333, 335 (11th Cir. 1984). For the variety of reasons expressed herein and reflected in the body of scientific literature, it is clear that assertion of the Fifth Amendment right to silence is not significantly probative of the existence *vel non* of psychosis at the time of commission of the offense and thus of sanity or insanity.

B.

The Constitution Forbids The State From Penalizing A Defendant For Exercising His Fifth Amendment Privilege By Using That Fact As Evidence At Trial.

The rationale of this Court's opinion in *Doyle v. Ohio*, 426 U.S. 610 (1976), is predicated upon considerations of unfairness and estoppel as well as evidentiary ambiguity. The rule of *Doyle* forbids the prosecution from placing a cost on the defendant's assertion of his *Miranda* rights by using it as evidence against him. The State is not allowed to penalize a defendant for exercising his Fifth Amendment privilege by showing that he stood mute or claimed the privilege in the face of an accusation. *Miranda v. Arizona*, 384 U.S. 436, 468 n. 37 (1966).

> . . . . [W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle v. Ohio, 426 U.S. at 618.

In *United States v. Hinckley*, 217 A.D.C. 262, 672 F.2d 115 (1982), the government argued that the defendant in an insanity case in effect "testifies by proxy" by raising the affirmative defense through the testimony of expert and lay witnesses. The Circuit Court of Appeals found no basis for converting the limited impeachment exception to *Doyle* into a general license to use the same evidence for rebuttal and found no explanation for singling out the insanity defense.

> All defense testimony is in a sense testimony by proxy, yet the government concedes that it would not seek to apply its rebuttal theory to an alibi or other affirmative defenses. We can find no reason for such a distinction.

672 F.2d at 134.

The *Hinckley* opinion was followed by the New York Supreme Court in *People v. Ricco*, 56 N.Y.2d 320, 452 N.Y.S.2d 340, 437 N.E.2d 1097 (1982). In that case, the State used statements taken in the absence of *Miranda* warnings to overcome the defense of insanity by showing their inconsistency with the defendant's claimed delusional state. Citing *Hinckley*, the court rejected the State's argument that a defendant who raises insanity should be deemed to have waived his Fifth Amendment rights. 452 N.Y.S.2d at 343-344.

An attempt to distinguish between "guilt" and "sanity" for purposes of applying *Miranda* and *Doyle* is specious. When guilt is predicated on sanity, silence is being used to show guilt no less than in any other case. A defendant who raises insanity is assured no less than any other defendant that he or she may rely on *Miranda* rights without being penalized for that reliance at trial. In the traditional *Doyle* case, evidence of silence is used to show the mental state of consciousness of guilt; in an insanity

case, it is used to show the mental state of lucidity. In both of these instances, the probative value of the evidence is either nonexistent or so diminished that it cannot justify the penalty placed on the constitutional right asserted.

The speciousness of a distinction between "guilt" and "sanity" for purposes of applying *Miranda* and *Doyle* has been recognized in opinions from several jurisdictions. In *People v. Rucker*, 26 Cal.3d 368, 162 Cal. Rptr. 13 (1980), the State attempted to rebut the defendant's diminished capacity defense by introducing evidence of statements obtained in violation of *Miranda* requirements. The California Supreme Court found "irrelevant" a purported distinction between substantive use of the evidence and its use to show an ability to respond logically. *Miranda* and the exclusionary rules protecting the Fifth Amendment privilege apply regardless of the purpose for which the evidence is introduced, and admission of the evidence in *Rucker* was reversible error. 162 Cal. Rptr. at 26-27.

Rucker was followed in two cases involving post-*Miranda* exercise of rights. In *People v. Schindler*, 114 Cal. App. 3d 183, 170 Cal. Rptr. 461 (1980), the State introduced the defendant's announcement that he would make no statement until he talked to an attorney as evidence rebutting the defense claim of a "panic state" and diminished capacity. The court found the evidence sufficient to uphold a murder verdict but held the State's rebuttal evidence to be reversible error. In *People v. Fabert*, 127 Cal. App. 3d 607, 179 Cal. Rptr. 702 (1982), the State introduced evidence of the defendant's exercise of the Fifth Amendment privilege to show "presence of mind" and to rebut the defense theory of "dissociative reaction" and diminished capacity. Once again, the court held the evidence inadmissible and ruled that prosecutorial use of the evidence to convey the impression that the defense was

fabricated exacerbated the prejudice, struck at the core of the defense, and was not cured by a limiting instruction.

In *Commonwealth v. Mahdi*, 388 Mass. 679, 448 N.E.2d 704 (1983), the Massachusetts Supreme Court held that, assuming post-arrest silence had any probative value, the use of such evidence to show sanity did not substantively differ from its use to show guilt or to impeach.

> The ultimate constitutional right at issue is still the right to remain silent. . . . Fundamental unfairness results from the use of evidence of such silence regardless whether the person exercising his or her constitutional right to remain silent claims insanity as a defense.

448 N.E.2d at 713-714. In *Mahdi*, evidence of post-arrest silence struck at the jugular of the insanity defense and, in view of the conflicting psychiatric testimony, could not be considered harmless error. 448 N.E.2d at 715.

In *State v. Burwick*, 442 So.2d 944 (Fla. Sup. Ct. 1983), the Florida Supreme Court found the *Miranda-Doyle* estoppel argument to be as forceful in the context of an insanity defense as it is in any other. Pointing out that the State can show the defendant's ability to carry on a rational and coherent conversation without specifically revealing an exercise of constitutional rights, the court found it fundamentally unfair for the State to lure the defendant into remaining silent and then to use that very silence at trial. 442 So.2d at 948.

In *People v. Vanda*, 111 Ill. App. 3d 551, 444 N.E.2d 609 (1st Dist. 1982), the Illinois Appellate Court held that it is constitutionally abhorrent to require the defendant to surrender a constitutional right to avoid being penalized at trial for its exercise, a principle which applies with equal force where the inquiry is sanity rather than "guilt."

> A constitutional privilege remains a constitutional privilege in either event and a defendant who raises an insanity defense should not be denied the protection of the Constitution simply because the crux of his case revolves around his mental state.

444 N.E.2d at 618-619. The reasoning of *Vanda* and all of the other cited authorities is consonant with this Court's long-standing admonition that the insanity defense cannot, any more than any other, be prejudiced by the admission of unconstitutionally seized evidence. *Kaufman v. United States*, 394 U.S. 217, 230 (1969).

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* respectfully urges that this Court should affirm the judgment of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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No. 84-1480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida,

Petitioner,

—v.—

DAVID WAYNE GREENFIELD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION

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BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union respectfully moves for leave to file the within brief as amicus curiae. Respondent, but not petitioner, has consented to the filing of this brief.

The American Civil Liberties Union is a non-profit organization with over 250,000 members nationwide devoted to the protection of civil rights and liberties of all Americans. One of the most cherished of these rights, characterized by this Court as "one of the great landmarks in man's struggle to make himself civilized," Ullman v. United States, 350 U.S. 422, 426 (1956), is the privilege against self-incrimination. The ACLU and its affiliates have appeared before this Court in numerous cases in which the Court has given depth and meaning to the fifth amendment privilege. E.g., Slochower v. Board of Higher Education, 350 U.S. 551 (1956); Malloy v. Hogan, 378 U.S. 1 (1964); Spevack v. Klein, 385 U.S. 511 (1967); Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

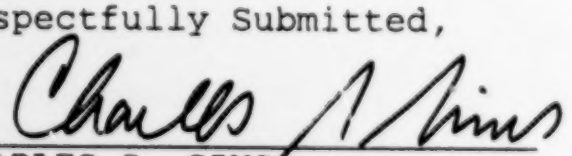
Although the parties and the court below have examined at length respondent's right to remain silent, as articulated in

Doyle v. Ohio, 426 U.S. 610 (1976), we believe they have devoted insufficient attention to the fifth amendment privilege upon which Doyle and Miranda v. Arizona, 384 U.S. 436 (1966), rest. In this case, use of and comment on respondent's request for counsel and invocation of the fifth amendment privilege violated both the privilege against self-incrimination and the rule of Doyle v. Ohio.

We believe that the analysis that follows may be of assistance in resolving these questions. Accordingly, we urge that the Court grant leave to file this brief.

Dated: September 5, 1985

Respectfully Submitted,



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INTEREST OF AMICUS CURIAE

The interest of amicus curiae appears in the foregoing motion.

SUMMARY OF ARGUMENT

Petitioner's use of and emphasis on respondent's post-Miranda silence in this case was impermissible for two independent reasons.

First, use of respondent's silence violated his fifth amendment privilege against compulsory self-incrimination. The privilege, applicable to the states under the fourteenth amendment, has been breached because respondent's silence was obtained under compulsion without a fifth-amendment waiver and was offered as a link in the chain of evidence establishing his guilt. Point I, infra.

Moreover, comment on respondent's silence in this case also contravened the

rule, established in Doyle v. Ohio, prohibiting use of the defendant's silence after Miranda warnings have been given. The rule of Doyle was abridged as well because respondent was led erroneously by the Miranda warnings to believe that his silence would not be admissible at trial on the issue of sanity or insanity. Point II, infra.

Regrettably, the parties' narrow focus on the rule of Doyle v. Ohio has pretermitted analysis of respondent's fifth amendment rights. Accordingly, we establish first that use of respondent's silence in these circumstances constituted a violation of the fifth amendment privilege against self-incrimination. We then demonstrate that the rule of Doyle applies with full force to post-Miranda silence offered in support of the defendant's sanity.

ARGUMENT

I. USE OF RESPONDENT'S SILENCE AFTER MIRANDA WARNINGS WERE GIVEN VIOLATED THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION

The fifth amendment to the United States Constitution declares that no person shall "be compelled in any criminal case to be a witness against himself." This Court has characterized the fundamental constitutional command that "the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth," Miranda v. Arizona, 384 U.S. 436, 460 (1966), as "one of the most valuable prerogatives of the citizen." Brown v. Walker, 161 U.S. 591, 610 (1896); see Slochower v. Board of Higher Education, 350 U.S. 551, 557 (1956).

The proscription on "compulsory extortion of a man's own testimony," Boyd v. United States, 116 U.S. 616, 630 (1886), prohibits use by the prosecution of "an accused's communications, whatever form they might take, and the compulsion of responses which are also communications." Schmerber v. California, 384 U.S. 757, 763-64 (1966). The privilege applies when (1) "communications or testimony," see South Dakota v. Neville, 459 U.S. 553, 561 (1983), are obtained (2) by "impermissible coercion," id. at 662, and would (3) "furnish a link in the chain of evidence that could lead to prosecution." Maness v. Meyers, 419 U.S 449, 461 (1975); Hoffman v. United States, 341 U.S. 479, 486 (1951); Blau v. United States, 340 U.S. 159, 161 (1950).

In this case, respondent's assertion of his desire to remain silent and the ensuing silence -- in short, his invocation of the fifth amendment privilege -- were offered as evidence of his sanity. As we demonstrate below, this substantive use of the fifth amendment privilege clearly violated the privilege itself.

In brief, respondent's silence was plainly "compelled" within the meaning of the fifth amendment. Respondent's arrest, together with the Miranda warning that his statements could and would be used against him at trial (JA-73), created a powerful impetus to remain silent and one which respondent obviously heeded. The arrest, moreover, rendered respondent incapable of avoiding transmission of such silence, and the message the prosecution urged it carried, to the arresting officers.

Both his answers and silence were also introduced for their communicative or testimonial value. Petitioner offered this evidence as evincing respondent's evident understanding of the Miranda warnings, his appreciation of the significance of remaining silent, and his capacity to act in conformance with this understanding. This Court has characterized similar evidence elicited during psychiatric examination as testimonial, see Estelle v. Smith, 451 U.S. 454, 463-64 & n.9 (1981), and no basis is suggested for treating respondent's answers and silence otherwise here.

Finally, petitioner offered this evidence as a link in the chain establishing respondent's guilt. Statements introduced to "achieve the consequence of eliminating an insanity defense and thus obtaining a conviction," United States v. Byers, 740

F.2d 1104, 1113 (D.C. Cir.) (en banc), cert. denied, 104 S. Ct. 717 (1984), comprise links in the chain toward guilt and are subject to the fifth amendment privilege. Walker v. Butterworth, 599 F.2d 1074, 1081-84 (1st Cir.), cert. denied, 444 U.S. 937 (1979).

Indeed, the prosecutor's comment in this case is legally indistinguishable from comment this Court has condemned for decades. The Court has long proscribed use of the defendant's assertion of the privilege in a criminal case to establish the element of mens rea.[1] In a transparent

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[1]See Griffin v. California, 380 U.S. 609, 613-14 (1965); Grunewald v. United States, 353 U.S. 391, 421 (1957) (dictum); Slochower v. Board of Education, 350 U.S. 551, 559 (1956); Johnson v. United States, 318 U.S. 189, 196-97 (1943); United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 112 (1927) (dictum); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 154-56 (1923) (dictum).

sleight of hand, the prosecutor in this case offered respondent's assertion of the privilege as evidence that respondent was capable of distinguishing right from wrong -- and was therefore sane -- at the time of the offense. The predicate to this argument is obviously the impermissible inference, adduced from respondent's assertion of the privilege, that he knew his conduct was wrong and was therefore capable of the requisite mens rea.

Because petitioner's failure to address fifth amendment issues creates errors of logic in its argument, we demonstrate in detail in Point I(A) below that respondent's answers and silence in response to Miranda warnings were privileged under the fifth amendment. We then establish in Point I(B) that the privilege was not waived or otherwise rendered ineffective

because respondent introduced expert psychiatric testimony on the issue of his sanity.

A. Respondent's Post-Miranda Answers and Silence Were Privileged Under the Fifth Amendment

The use of respondent's assertion of the privilege against self-incrimination to establish his sanity constituted a clear violation of the privilege itself. We turn to each of the elements for invocation of the privilege:

1. Compulsion

Respondent's answers to the Miranda questions and his ensuing silence were plainly "compelled" within the meaning of the fifth amendment. At the time in question, respondent had been arrested and

warned that "[y]ou have a right to remain silent" and "[a]nything you say can and will be used against you in a court of law" (JA-71, 73). The arrest, and subsequent warnings that anything said could and would be used at trial, created patent and substantial pressures to remain silent. See Johnson v. United States, 318 U.S. 189, 197-199 (1943) (similar conclusion for instruction at trial that defendant may claim privilege). Because respondent had been placed in custody, transmission to the arresting officers of the message claimed to inhere in his silence was unavoidable. Accordingly, elicitation of respondent's silence was "compelled" within the meaning of the fifth amendment.

Nor, contrary to petitioner's suggestion, is the giving of Miranda warnings

necessary to this conclusion.[2] It has been clear since Bram v. United States, 168 U.S. 532 (1897), that the fifth amendment privilege attaches at the commencement of custody,[3] see Ziang Sung Wan v. United

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[2]Petitioner erroneously suggests that "respondent's desire for an attorney and decision to remain silent would clearly be admissible" had Miranda warnings not been administered. Br. at 19 (relying on Fletcher v. Weir, 455 U.S. 603 (1982) (per curiam)). The error stems from petitioner's failure to address or appreciate the fifth amendment issue. The defendant in Fletcher testified, thereby waiving any fifth amendment privilege proscribing comment on prior silence. Jenkins v. Anderson, 447 U.S. 231, 235-36 (1980); Raffel v. United States, 271 U.S. 494, 496-97 (1926); see Brown v. United States, 356 U.S. 148, 154-55 (1958) ("the breadth of his waiver is determined by the scope of relevant cross-examination"). When the defendant does not testify -- as respondent here did not -- supervening fifth amendment constraints remain in force, and comment on the defendant's post-custodial silence is impermissible.

[3]See Jenkins v. Anderson, 447 U.S. 231, 244 (1980) (Stevens, J., concurring in the judgment) ("[f]or in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled").

States, 266 U.S. 1, 14-15 (1924), and proscribes affirmative use of all compelled communications of the accused. The Miranda warnings simply impart knowledge of the privilege. Independent knowledge of the privilege, of course, imparts similar pressure to remain silent. Accordingly, when the accused does not testify, testimonial use of post-custodial silence would be subject to applicable fifth amendment strictures even in the absence of Miranda warnings.[4]

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[4]Thus, petitioner plainly errs by suggesting that any prohibition on the prosecutor's comment on post-custodial silence would "penalize the state" for promptly administering Miranda warnings. Br. at 19. To the contrary, when, as here, the defendant does not testify, such comment would be prohibited by force of the fifth amendment without regard for the giving of Miranda warnings.

In any event, petitioner can hardly be heard to complain that, had respondent testified, it would have been denied the "benefit" of violating Miranda -- a benefit to which there is obviously no lawful entitlement.

Because Miranda warnings were given, however, the analysis is quite simple. Respondent's silence in the wake of Miranda warnings was "compelled" within the meaning of the fifth amendment.

2. Communication or Testimony

Likewise, respondent's request for an attorney and invocation of the privilege were offered for their testimonial or communicative value. The use of silence for testimonial purposes is hardly novel. "Silence," as the Court concluded in United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923), "is often evidence of the most persuasive character." Id. at 153-54. The failure to deny an allegation when denial would be natural is frequently taken as

evidence of its truth,[5] and is the evidential equivalent of testimony to that effect.

Similarly, assertion of a statement or silence may impart additional implicit information. Thus, in Walker v. Butterworth, 599 F.2d 1074 (1st Cir.), cert. denied, 444 U.S. 937 (1979), the First Circuit held that mandatory personal exercise by the defendant of the right of peremptory challenge violates the privilege against self-incrimination. The prosecutor in Butterworth, like the prosecutor here, urged that

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[5]United States v. Hale, 422 U.S. 171, 176 (1975); 3A J. Wigmore, Evidence § 1042 (J. Chadbourn rev. 1970), quoted in Baxter v. Palmigiano, 425 U.S. 308, 319 n.3 (1976); see Grunewald v. United States, 353 U.S. 391, 421-23 (1957); Adamson v. California, 332 U.S. 46, 56 (1947); United States ex rel. Vajtauer v. Commisisoner of Immigration, 273 U.S. 103, 111-12 (1927).

the defendant's exercise of peremptory challenges be taken as evidence of the defendant's sanity. In a closing argument bearing striking similarity to that at issue here, the prosecutor exhorted:

> Do you think [the defendant] knew what he was doing when he stood up there and said, "I am content with this juror? I am content with this juror? I am content with this juror?"

599 F.2d at 1076.

The First Circuit quite properly concluded that "Walker was obviously communicating his satisfaction with the individual jurors." Id. at 1082. In exercising these challenges, the court held,

> Walker was transmitting, against his will, an important message to the jury. Roughly translated, this message would read: "the accused can rationally and sanely communicate with his lawyer and make important trial decisions."

Id. (footnote omitted).[6]

With the simple substitution of respondent's request for an attorney and assertion of the fifth amendment privilege for the defendant's exercise of peremptory challenges in Walker, petitioner has made precisely the argument rebuffed by the First Circuit. These words were not, the court held, used for their "identifying characteristics," see United States v. Wade, 388 U.S. 218, 221-23 (1967), or

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[6]The First Circuit further observed:

> Of course, this transmitted message might be completely erroneous. Forcing one to exercise his peremptory challenges personally may well produce a dangerously incorrect impression of sanity precisely because the person is not communicating with entire independence and under his own free will.

599 F.2d at 1082 n.9.

for measurement of the defendant's "physical properties," United States v. Dionisio, 410 U.S. 1, 7 (1973). Rather,

> in the context of an insanity defense, the words necessarily take on an additional meaning and relate important and incriminating information. The content of the words and the mental processes that they necessarily embodied and revealed, conveyed an inescapable message to the jury.

599 F.2d at 1082-83.

Similarly, in Estelle v. Smith, 451 U.S. 454 (1981), this Court concluded that a defendant's communications during a pretrial psychiatric examination conducted for the purpose of assessing the defendant's future dangerousness were testimonial in nature. Id. at 463-65. The psychiatric prognosis, the Court reasoned, "rested on statements respondent made and remarks he omitted." Id. at 464. The fifth amendment privilege was therefore "directly involved

here because because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination." Id. at 465; see South Dakota v. Neville, 459 U.S. 553, 561 n.12 (1983).

Respondent's assertions and silence were, in this case, plainly indistinguishable from those addressed in Estelle; indeed, as communications supporting an inference of sanity, their function was identical to that of communications offered in Estelle to support an inference of dangerousness. Nor is any meaningful distinction suggested between examination for dangerousness in Estelle and that for sanity here. Accordingly, respondent's request for an attorney and invocation of the privilege against self-incrimination were communications within the meaning of the fifth amendment privilege.

3. Link in the Chain of Evidence

The fifth amendment privilege "does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution." Maness v. Meyers, 419 U.S. 449, 461 (1975).[7]

Because mens rea is an element of the crime charged, statements tending to establish intent are both "information which would furnish a link in the chain of evidence that could lead to prosecution"

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[7]See Hoffman v. United States, 341 U.S. 479, 486 (1951); Blau v. United States, 340 U.S. 159, 161 (1950); United States v. Burr, 25 F. Cas. 38 (C.C.D. Va. 1807) (No. 14,692e).

and evidence which the accused may "reasonably believe[] could be used against him in a criminal prosecution." Maness, supra, 419 U.S. at 461. Accordingly, use of the defendant's assertion of the privilege to support an inference that he knew his conduct was wrong is prohibited.

So, too, is use of the defendant's invocation of the privilege to establish capacity to possess the requisite mens rea -- in short, the defendant's sanity -- prohibited. Assertion of the privilege is offered in both cases on the issue of guilt. Indeed, this conclusion flows a fortiori from Estelle v. Smith, supra, which "discern[ed] no basis to distinguish between the guilt and penalty phases of" a capital murder trial "so far as the protection of the Fifth Amendment privilege is concerned." 451 U.S. at 462. Assessment of

the defendant's mental state at the penalty phase in Estelle obviously bore less directly on guilt than does a similar assessment of the defendant's sanity.[8]

Moreover, the predicate to petitioner's theory of admissibility itself rests on an impermissible inference derived from respondent's invocation of the privilege. The prosecutor sought to establish respondent's capacity to distinguish right from wrong and to appreciate "the nature of his act or its consequences" (JA-11 n.2). Respondent's assertion of the privilege, the prosecutor effectively urged, revealed that respondent appreciated the wrongful-

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[8]See United States v. Byers, supra, 740 F.2d at 1112-13 ("A similar conclusion would seem compelled with regard to statements to a psychiatrist that are introduced to achieve the consequence of eliminating an insanity defense and thus obtaining a conviction.").

ness of his actions, and thus that he had the capacity to make such distinctions. The predicate for this argument, of course, is the impermissible inference that respondent's invocation of the privilege could be taken as evidence of belief that his actions were wrong. Slochower, supra, 350 U.S. at 557-58.

For these reasons, absent waiver of the privilege, use of and comment on respondent's answers and silence violated the privilege against self-incrimination.

B. The Privilege Applicable To Post-Custodial Communications Was Not Waived or Otherwise Rendered Inapplicable By Respondent's Use of Expert Psychiatric Testimony

This Court has suggested, without deciding, that a defendant who "asserts the insanity defense and introduces supporting psychiatric testimony . . . can be required

to submit to a sanity examination conducted by the prosecution's psychiatrist." Estelle v. Smith, supra, 451 U.S. at 465.[9] Any such suspension of the privilege, however, does not apply to communications elicited in violation of the privilege when the defendant is in custody following arrest.

Relaxation of the privilege for such expert psychiatric examination rests on three grounds, none of which has application here. When the defense offers expert psychiatric testimony, expert examination of the defendant may afford "the only effective means [the State] has of contro-

[9] See, e.g., Taylor v. Best, 746 F.2d 220, 223-24 (4th Cir. 1984); United States v. Byers, supra, 740 F.2d at 1109-15; Watters v. Hubbard, 725 F.2d 381, 384-85 (6th Cir.), cert. denied, 105 S. Ct. 133 (1984); United States v. Madrid, 673 F.2d 1114, 1121 (10th Cir.), cert. denied, 459 U.S. 843 (1982); Estelle v. Smith, supra, 451 U.S. at 465-66 and cases cited therein.

verting his proof on an issue that he interjected into the case." Estelle, 451 U.S. at 465. See United States v. Bohle, 445 F.2d 54, 66 (7th Cir. 1971) (expert examination permitted "because of the great importance of expert testimony on the issue of insanity"). Moreover, because such examination is conducted by an expert under professional conditions, communications upon which the expert relies may be expected to bear a reliable relationship to the defendant's mental state. Finally, any such evidence is introduced at trial through expert testimony, affording explanation, guidance, and perspective to the jury. See Walker v. Butterworth, supra, 599 F.2d at 1083 ("resulting psychiatric analysis sufficiently neutral and buffered by expertise to equate it with the medical examination of physical characteristics").

These considerations are without relevance to post-custodial communications playing no part in psychiatric evaluation; indeed, they make plain the applicability of the privilege to such communications. Although the prosecution introduced expert psychiatric testimony in rebuttal (JA-11-12), respondent's invocation of the privilege against self-incrimination played no role in this testimony (JA-36 n.9). Accordingly, "[t]his is not a situation where there is an important interest to be served by permitting reliable and expert evidence." Walker, supra, 599 F.2d at 1084.

Quite to the contrary, the thread of logic linking respondent's assertion of the privilege and his sanity is gossamer thin -- if not altogether nonexistent -- precisely because no professional has determined that respondent's sanity and invoca-

tion of the privilege bear any necessary relationship.[10] The prosecutor's theory was, at bottom, amateurish speculation lacking expert evaluation or guidance, offered in its raw form to the jury without opportunity for cross-examination or explanation.

Under these circumstances, no purpose is served by circumvention of the fifth amendment privilege. Rather, denial of the privilege invites unnecessary, and inevitably misleading, speculation on inferences to be drawn from respondent's constitutional right to remain silent. See Stewart v. United States, 366 U.S. 1, 3-6 (1961). This Court has never authorized the use of

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[10] Cf. Youngberg v. Romeo, 457 U.S. 307, 323 (1982) (encroachment on liberty interests in safety and freedom from restraint must be based on exercise of professional judgment).

such compelled communications neither relied upon nor introduced through psychiatric expert testimony; certainly no basis for doing so arises here.[11]

In conclusion, the privilege against self-incrimination prohibited petitioner's affirmative use of respondent's post-custodial remarks and silence as evidence of his sanity.

II. THE RULE OF DOYLE V. OHIO APPLIES WITH FULL FORCE TO USE AT TRIAL OF POST-MIRANDA SILENCE TO ESTABLISH THE DEFENDANT'S SANITY

The rule of Doyle v. Ohio, 426 U.S. 610 (1976), likewise forbade use of and comment on respondent's request for counsel

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[11] The questions of affirmative use of the defendant's post-Miranda silence in expert testimony for the prosecution, and use of such silence to impeach expert testimony for the defense, are not before this Court.

and invocation of the privilege against self-incrimination as evidence of his sanity.

By its plain language, Doyle applies with full force to comment on the defendant's silence to establish sanity. This Court reasoned in Doyle that while "the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." 426 U.S. at 618. In these circumstances, the Court held, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id. (footnote omitted).

The warnings themselves make no distinction between use of silence to attack credibility and to establish guilt. Any

assurances made by the warnings as to credibility therefore apply with equal force to inferences of guilt. Indeed, such assurances apply with greater vigor to guilt, since the underlying privilege against self-incrimination permits impeachment by prior silence when the defendant testifies, Jenkins v. Anderson, 447 U.S. 231, 235-38 (1980); Raffel v. United States, 271 U.S. 494, 496-97 (1926), but proscribes inferences of guilt without regard for whether the defendant testifies. Grunewald v. United States, 353 U.S. 391, 421 (1957).

Accordingly, the issue is not, as petitioner contends, whether the Eleventh Circuit "extended" Doyle beyond its proper compass. To the contrary, the issue is whether a niche is to be carved from Doyle for inferences relating to sanity. As we

demonstrate below, none of the arguments for exempting inferences of sanity from the rule of Doyle has merit.

A. Considerations Relating To Probativeness of Inferences Drawn from Silence to the Issue of Sanity Do Not Justify Suspension of the Rule of Doyle

Contrary to petitioner's suggestion, any purportedly probative value respondent's request for counsel and invocation of the fifth amendment privilege may have had on the issue of his sanity is not ground for suspension of the holding of Doyle.

First, the Court in Doyle rejected the argument now advanced by petitioner in circumstances considerably stronger than these. Writing for the dissent in Doyle, Justice Stevens urged, with sounder basis

than petitioner here, that Doyle's post-Miranda silence had substantial probative value, in part because the record belied any reliance by him on the Miranda warnings, 426 U.S. at 622-24 (Stevens, J., dissenting), and in part because such reliance should not be presumed.[12] Setting aside such reliance in the first stage of his argument, Justice Stevens reasoned that Doyle's silence was therefore "almost inexplicable" and "tantamount to a prior inconsistent statement admissible for purposes of impeachment." Id. at 621-22.

Although the majority in Doyle expressed dubiety at the theory that Doyle's silence, apart from reliance on Miranda

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[12]Because reliance on Miranda warnings is established here, the case for probative value of respondent's silence is weaker than that in Doyle.

warnings, had probative value,[13] it also rejected this consideration as irrelevant:

> Nor is it necessary, in view of our holding above, to express an opinion on the probative value for impeachment purposes of petitioners' silence. We note only that the Hale court considered silence at the time of arrest likely to be ambiguous and thus of dubious probative value.

426 U.S. at 617 n.8.

The underlying probative value of Doyle's silence, apart from Miranda warnings, was unnecessary to assess, of course, because the Court declined to embark on the first stage of Justice Stevens' argument, and therefore found no need to reach the second stage. Rather, the Court held that

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[13]Relying on United States v. Hale, 422 U.S. 171, 177 (1975), the Court "noted that silence at the time of arrest may be inherently ambiguous even apart from the effect of Miranda warnings, for in a given case there may be several explanations for the silence that are consistent with the existence of an exculpatory explanation." Doyle v. Ohio, supra, 426 U.S. at 617 n.8.

the jury may not be informed, through cross-examination, of the defendant's post-Miranda silence. This conclusion, in turn, followed because the Court regarded it as fundamentally unfair to impugn an inconsistency based on silence after promising implicitly that no such use would be made of the defendant's silence.[14]

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[14]Thus the Court explained in footnote 10:

> The dissenting opinion relies on the fact that petitioners in this case, when cross-examined about their silence, did not offer reliance on Miranda warnings as a justification. But the error we perceive lies in the cross-examination on this question, thereby implying an inconsistency that the jury might construe as evidence of guilt. After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right.

426 U.S. at 619 n.10 (emphasis added).

Accordingly, the underlying probative value of silence, absent reliance on Miranda warnings, was not relevant under Doyle. Moreover, this conclusion acquires renewed force when, as here, the defendant actually relied on Miranda warnings. For these reasons, we believe that the Eleventh Circuit below erred by engaging in speculation on the probativeness of respondent's silence. Greenfield v. Wainwright, 741 F.2d 329, 333-34 (11th Cir. 1984) (JA-21-24). Although we agree that respondent's request for counsel and invocation of the fifth amendment privilege had little if any relevance to his sanity, this inquiry is simply beside the point -- and is certainly so when, as here, actual reliance on the Miranda warnings is shown.

Finally, there is sound reason for

excluding such freewheeling speculation on the probative value, if any, of the defendant's invocation of the fifth amendment privilege. The omnipresent danger in this case -- as in all cases in which inferences are invited from an assertion of the privilege -- is "that the jury might construe [silence] as evidence of guilt." Doyle, 426 U.S. at 619 n.10. The danger is most acute when, again as here, the defendant has in fact invoked the fifth amendment privilege.

For these reasons, speculation on the probative value of respondent's invocation of the fifth amendment privilege is no warrant for failing to apply the rule of Doyle v. Ohio to inferences regarding the defendant's sanity.

B. Considerations of "Deterrence" Also Do Not Justify Suspension of the Rule of Doyle

Relying erroneously on Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. denied, 460 U.S. 1043 (1983), petitioner also urges that this Court take cognizance of an allegedly marginal deterrent effect on the exercise of respondent's constitutional rights caused by evidential use of his fifth amendment privilege. This argument, too, lacks merit.

The prosecution in Sulie offered the defendant's request for counsel as evidence of his sanity. Dismissing without serious consideration Judge Cudahy's argument that the Miranda warnings convey implicit assurance that a request for counsel will not be used against the defendant -- just as they convey similar assurance that silence will

not be so used[15] -- the Sulie court disgarded the holding of Doyle as inapposite.

Accordingly, the court turned to any burden on Sulie's right to counsel. Because formal judicial proceedings had not yet commenced, see Moore v. Illinois, 434

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[15]Judge Cudahy reasoned:

> These same considerations [addressed in Doyle] apply when the defendant's response to the Miranda warnings is not silence but a request to contact a lawyer. Because the State is required under Miranda to advise an accused of both the right to remain silent and the right to counsel, exercise of the latter right is as "insolubly ambiguous" as the exercise of the former right. More importantly for my principal point, just as the Miranda warnings implicitly assure an accused that exercise of the announced right to silence will carry no penalty, so too must they implicitly give assurance that a defendant's exercise of the announced right to counsel will carry no penalty.

689 F.2d at 132 (Cudahy, J., dissenting).

U.S. 220, 226-27 (1977), the sixth amendment right to counsel had not attached; at issue was rather the right to counsel at interrogation promised by Miranda. The court theorized that any burden on this right -- characterized as a "judge-made enforcement device" for ensuring compliance with the fifth amendment privilege -- should be assessed in light of "how much the exercise of the right to remain silent would be deterred if a suspect knew that a request for a lawyer could be used as evidence of his sanity." 689 F.2d at 130.

Notwithstanding petitioner's legal gymnastics importing the economic theory of law into yet another arena of constitutional doctrine,[16] such a deterrence analysis

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[16] Cf. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics").

has no place in this case. The Seventh Circuit regarded Doyle as inapposite because that court understood the Miranda warnings to convey no implicit promise to forbear from using the defendant's request for counsel at trial. Regardless of whether this crabbed reading of Doyle has merit, it has no applicability here. The prosecutor here commented on respondent's invocation of the privilege as well as his request for counsel, bringing the case squarely within the compass of Doyle. No right-to-counsel theory has been advanced in this case; consequently, this Court has no occasion to consider whether -- were the case to rest on right-to-counsel foundations -- the appropriate mode of analysis would entail consideration of the speculative deterrent effect caused by comment on

the defendant's request for counsel.[17]

Nor is any deterrent analysis appropriate under Doyle itself. This Court held in Doyle that comment on the right of silence promised by the Miranda warning is "fundamentally unfair and a deprivation of due process." 426 U.S. at 618. Fundamental due process constraints on state criminal proceedings are not "enforcement device[s]." They are, of course, constitutional rights. Their efficacy, until the due process clause is amended, does not

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[17]There is, moreover, strong reason for believing that application of the Seventh Circuit's "deterrence" analysis was legal error even in the "Miranda right-to-counsel" setting. When the defendant, as in Sulie, has been arrested, taken into custody, and has requested counsel, the right to counsel identified in Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964), attaches, after which point the analysis of Griffin v. California, 380 U.S. 609, 614 (1965), would apply with equal force to comment impairing the right to counsel.

turn on speculation whether the deterrent value of these rights exceeds the quality of evidence gained by their violation.

CONCLUSION

For these reasons, we urge that this Court affirm the judgment of the Eleventh Circuit. Comment on respondent's post-Miranda silence in this case clearly violated the constitutional privilege against self-incrimination. Moreover, such comment also violated the rule of Doyle v. Ohio because respondent was led erroneously by the Miranda warnings to believe that his silence would be inadmissible at trial on the issue of sanity or insanity.

Dated: New York, New York
September 5, 1985

Respectfully submitted,

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